Hastings Law Journal

Volume 51 | Issue 6 Article 3

1-2000

Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution

Sarah Rudolph Cole

Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution

by
SARAH RUDOLPH COLE*

In recent years, both courts and legislatures have expressed a strong preference for alternative dispute resolution tools as a means for encouraging settlement and reducing judicial workloads.[1] This preference for alternative dispute resolution (ADR) has resulted in courts adopting mediation and arbitration techniques within the confines of the traditional litigation process.[2] Court-annexed arbitration and court-ordered mediation, for instance, are now common in courts across the country.[3] This widespread use of ADR

* Associate Professor of Law, Ohio State University College of Law. My thanks to Douglas Cole, Nancy Rogers, Wallace Rudolph, Arthur Greenbaum, and Ruth Colker for their input and to Amy Muth and Emily Haynes for their excellent research assistance.

1. *See, e.g.*, GABRIEL WILNER, 2 DOMKE ON COMMERCIAL ARBITRATION § 4.01 (rev. ed. 1998) (explaining that "[t]here is little doubt that the sudden interest shown by the courts and the legislators in the various forms of alternative dispute resolution, with an emphasis on arbitration, as a means to relieve the burdens of the judicial system and to make justice accessible and affordable to a greater number of citizens is due to a large extent to the current court congestion"); Jona Goldschmidt & Michael Hallett, *Balancing Act: Implementing a Statewide, Court-Sponsored ADR Program*, 80 JUDICATURE 222, 229 (1997) (stating that the Arizona Supreme Court distributes funds to courts statewide to implement ADR programs to reduce court caseloads); Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?*, 18 HAMLINE J. PUB. L. & POL. 376, 380 (1997) (stating that Minnesota encourages use of ADR in order to reduce caseloads); Gary Spencer & Carl Gaines, *Heavy Backlog Leads to Forced ADR*, NAT'L L.J., Sept. 28, 1998, at A8 (stating that the federal court for the Northern District of New York requires parties to participate in ADR in order to reduce the backlog of cases facing the court).

2. *See The Director as Futurist: Jack Hanna Previews 'Coming Attractions' in ADR*, ADR REPORT, Feb. 16, 2000, at 4 (discussing the impact of the "huge trend" toward increasing legalization and institutionalization of mediation).

3. As of 1997, 22 of the 94 federal district courts and 33 states offered court-annexed arbitration. *See* ELIZABETH PLAPINGER & MARGRET SHAW, COURT ADR: ELEMENTS FOR PROGRAM DESIGN (1992). By 1998, one quarter of federal district courts had created

techniques is not surprising; studies of mediation and arbitration continue to demonstrate that these ADR tools provide efficient, low cost dispute resolution, while at the same time providing a high degree of party satisfaction.[4]

While the increased judicial acceptance of ADR is not surprising, it does create a fundamental, but as yet largely unrecognized, problem for courts. ADR is built primarily on a party autonomy model; party consent is the nearly exclusive guiding principle for process design. Both arbitration and mediation, for instance, began as wholly private dispute resolution mechanisms subject to nearly complete party control.[5] In mediation, for example, the parties control virtually every aspect of the process from the subject matter of the discussion to the drafting of the settlement agreement.[6] Similarly, in arbitration, the parties control how evidence is presented, what procedural rules will apply, how the arbitrator will render his decision and what remedies the arbitrator may award.[7] In

---

either court-annexed or voluntary arbitration programs. Moreover, 51 federal district courts maintain court-annexed mediation programs. *See* KATHERINE V.W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 4 (2000). The Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-58 (1998), requires every federal district court to implement a dispute resolution program and authorizes the court to create mandatory mediation programs.

4. *See generally* NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH: A REPORT ON CURRENT RESEARCH FINDINGS—IMPLICATIONS FOR COURTS AND FUTURE RESEARCH NEEDS (Susan Ketlitz ed., 1994) (time and cost results vary for court mediation programs); Kent Snapp, *Five Years of Random Testing Shows Early ADR Successful*, 3 DISP. RESOL. MAG. 16 (1997) (Federal Judicial Center study of one federal district court finds cases settle earlier with mediation and attorneys save costs); *but see generally* JAMES S. KAKALIK, AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996) (RAND corporation researchers studying four federal court mediation and two early neutral evaluation programs find that programs have little effect on costs or time for parties or the court).

5. SPIDR, one of the largest organized groups of mediators in the United States, emphasizes the importance of protecting the concept of party autonomy in the mediation process. *See* Society of Professionals in Dispute Resolution, *Ensuring Competence and Quality in Dispute Resolution Practice*, *in* REPORT 2 OF THE SPIDR COMMISSION ON QUALIFICATIONS (1995). According to SPIDR, the values and goals of dispute resolution include, "increased disputant participation and control of the process and outcome." *Id.* at 5. A similar attitude pervades arbitration. According to the drafters of the Revised Uniform Arbitration Act, arbitration is a consensual process in which party autonomy receives primary consideration. *See* Revised Unif. Arbitration Act, *Prefatory Note* (Proposed Revisions, Feb. 23, 2000).

6. *See* Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982) (according to Riskin, in mediation the ultimate control remains with the parties).

7. *See* Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 433-34 (1988); JOHN S. MURRAY ET AL., ARBITRATION, at 209-24 (1996) (discussing

fact, studies suggest that it is the parties' ability to retain control of these processes that makes them so willing to participate.[8]

To date, in adopting the traditional ADR tools for their own use, courts have largely accepted the party autonomy model, willingly adapting their own processes to meet the articulated needs of the litigants.[9] Indeed, in light of the demonstrated willingness of courts to shape their procedures based on litigant requests, one could easily argue that the era of managerial judging[10] is over and a new age of "managerial litigants" has begun. These managerial litigants attempt to shape the process used to decide their disputes, and expect the courts to implement any approach upon which the parties have agreed.

The question of whether, and to what extent, this type of litigant control over the dispute resolution process in the judicial setting is appropriate, however, has been largely ignored. Mediation and arbitration have traditionally been wholly private processes, and thus it is neither surprising nor particularly troublesome that parties participating in these processes have substantial autonomy. Courts, however, are not private institutions. They are public institutions,

---

parties' ability to craft arbitration procedures to suit their needs).

8. *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 29 (1988) (disputants view dispute resolution processes as fairer when process control is vested in those affected by the decision).

9. In several instances, courts have sanctioned party requests despite a lack of authorization from a federal or state statute. For example, courts have upheld the authority of arbitrators to decide cases or issues without an evidentiary hearing when asked to do so by the parties. *See* Revised Unif. Arbitration Act § 15(b) (Proposed Revisions, Feb. 23, 2000). Many courts have granted party requests for judicial review of arbitral awards on grounds beyond those articulated in the Federal Arbitration Act. *See* LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 889 (9th Cir. 1997); Syncor Int'l Corp. v. McLeland, No. 96-2261, 1997 U.S. App. LEXIS 21248, at *1 (4th Cir. Aug. 11, 1997) (per curiam) (parties agreed that arbitration decision would be reviewed for "errors of law"); Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 996 (5th Cir. 1995); New England Util. v. Hydro-Quebec, 10 F. Supp. 2d 53, 57 (D. Mass. 1998) (parties agreed to judicial review of arbitral award for errors of law); Westinghouse Elec. Corp. v. New York City Transit Auth., 14 F.3d 818, 822 (2d Cir. 1994) (parties agree to judicial review of arbitral award under "arbitrary and capricious" standard); South Wash. Assocs. v. Flanagan, 859 P.2d 217 (Colo. Ct. App. 1992) (parties agree to same standard of review as is used to review findings of fact and conclusions of law by a Colorado District Court). In the mediation context, magistrates and judges are frequently asked to act as mediators in cases over which they are scheduled to preside. *See, e.g.,* Hameli v. Nazario, 930 F. Supp. 171, 182 (D. Del. 1996) (stating it may be appropriate for magistrates to act as mediators); *but see* Evans v. State, 603 So. 2d 15 (Fla. Dist. Ct. App. 1992).

10. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (describing managerial judging as the increased willingness of judges to manage cases through devices such as pre-trial settlement conferences).

funded by public resources, designed to serve a public function.[11] While this public function often includes adjudication of public rights between private litigants, the court nevertheless maintains its identity as a public institution even when acting in this capacity.[12] The court's power derives not from contract but from statute.[13] Those same statutes, however, constrain the court both with respect to the cases it may hear,[14] and with respect to the dispute resolution procedures it may employ.[15] The outcomes of judicial proceedings, i.e., opinions, are similarly public in nature. While a court's opinion certainly impacts the litigants before it, the opinion also becomes a component of the public good known as precedent, and benefits society as a whole by increasing the predictability of legal rules, thereby allowing for more efficient private ordering.[16]

It is the tension between the court's nature as a public institution, and its interest in speedy resolution of particular disputes between private litigants that appear before it, which lies at the heart of the debate over the appropriate treatment of managerial litigants' requests for non-traditional judicial involvement in disputes. As governmental institutions imbued with substantial power, courts must act in a manner consistent with their institutional duties and obligations. Courts and commentators have referred to this need to remain faithful to institutional underpinnings as "institutional integrity."[17] In other words, judges must act judicially; they must comport themselves in a manner consistent with traditional

11. *See* Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

12. *See id.* ("[The court's job] is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes.").

13. *See id.*

14. *See* 28 U.S.C. §§ 1331, 1332, 1343, 1345 (1999) (describing the extent of federal district courts' limited jurisdiction). *See also* King v. Love, 766 F.2d 962, 967 (6th Cir. 1985) (involving scope of judicial immunity and stating that "federal courts indisputably are courts of limited jurisdiction"); Figueroa v. Blackburn, 39 F. Supp. 2d 479, 489 (D.N.J. 1999) (same); Fifty Assocs. v. Prudential Ins. Co. of Am., 446 F.2d 1187, 1190 (9th Cir. 1970) (stating that federal courts have limited jurisdiction so litigants must properly plead diversity of citizenship).

15. *See* FED. R. CIV. P. 1 (stating that there shall only be one form of action); FED. R. CIV. P. 16 (outlining the court's duties regarding pretrial settlement efforts).

16. *See* U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994) (judgments should not be vacated simply because the settlement agreement provides for it—precedent has a public value); *In re* Memorial Hosp. of Iowa County, Inc., 862 F.2d 1299, 1302 (7th Cir. 1998) (precedent has a social value).

17. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 651 (7th Cir. 1989); Hume v. M & C Management, 129 F.R.D. 506, 507 (N.D. Ohio 1990); Grynberg Prod. Corp. v. British Gas, P.L.C. 867 F. Supp. 1278, 1286 (E.D. Tex. 1994).

understandings of social behavior. Moreover, courts must protect themselves from abuses of the judicial process that might make them appear to be unprincipled decision-makers.[18]

Managerial litigants' requests for non-traditional judicial intervention present the possibility of significant threats to the courts' institutional integrity. Imagine, for instance, that the parties have agreed that a court will have the power to review an arbitral award, but that the review must be accomplished by flipping a coin, or by casting lots. While the parties could certainly agree to resolve their disputes privately by such means, co-opting a judge to employ such procedures presents implications for the courts' institutional integrity. While managerial litigants have yet to propose procedures this extreme, they have undeniably started down this path. Already parties have jointly requested courts to perform review of arbitral awards on bases not specified in the Federal Arbitration Act (FAA),[19] they have asked judges to act as mediators,[20] and they have proposed that in assessing arbitral awards the courts decide contested evidentiary matters without evidentiary hearings.[21]

In light of such examples, the appropriate treatment of managerial litigants' requests is no longer merely an academic question. Courts need a reliable and consistent framework for evaluating the various requests and determining which they will adopt, and which they must deny. In constructing such a framework, it is instructive to note that while in the context of arbitration and mediation the courts have been remarkably open to litigants' requests, the same has not been as true elsewhere. Take, for

18. *See Heileman*, 871 F.2d at 651; *Hume*, 129 F.R.D. at 507; *Grynberg*, 867 F. Supp. at 1286.

19. *See, e.g.*, LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 889 (9th Cir. 1997); Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 996 (5th Cir. 1995); Syncor Int'l Corp. v. McLeland, No. 96-2261, 1997 U.S. App. LEXIS 21248, at *1 (4th Cir. Aug. 11, 1997) (per curiam) (parties agreed that arbitration decision would be reviewed for "errors of law"); New England Utils. v. Hydro-Quebec, 10 F. Supp. 2d 53, 57 (D. Mass. 1998) (parties agreed to judicial review of arbitral award for errors of law); Westinghouse Elec. Corp. v. New York City Transit Auth., 14 F.3d 818, 822 (2d Cir. 1994) (parties agree to judicial review of arbitral award under "arbitrary and capricious" standard); South Wash. Assocs. v. Flanagan, 859 P.2d 217 (Colo. Ct. App. 1992) (parties agree to same standard of review as is used to review findings of fact and conclusions of law by a Colorado District Court).

20. *See, e.g.*, Hameli v. Nazario, 930 F. Supp. 171, 182 (D. Del. 1996).

21. *See* Arbitration between InterCarbon Bermuda, Ltd. and Caltex Trading and Transp. Corp., 146 F.R.D. 64 (S.D.N.Y. 1993); Schlessinger v. Rosenfeld, Meyer & Susman, 47 Cal. Rptr. 2d 650 (1995); Stifler v. Weiner, 488 A.2d 192 (Md. Ct. Spec. App. 1985); Pegasus Constr. Corp. v. Turner Constr. Co., 929 P.2d 1200 (Wash. Ct. App. 1997).

example, the judicial response to requests for vacatur. In the typical case, parties file a joint motion requesting that a court vacate a lower court judgment as a condition precedent to settlement of the parties' dispute.[22] Despite agreement among the parties, courts faced with these requests did not merely rubber-stamp them. Rather, they first considered whether courts have the statutory authority to effect the vacatur. Finding such authority in Federal Rule of Civil Procedure 60(b),[23] courts next balanced the parties' interest in settling their dispute against the impact granting the request would have on the court's institutional integrity.[24] In particular, courts focused on the concern that if society believes that parties may use court decisions as bargaining chips in an effort to obtain a particular result, society may lose respect both for the decisions courts make and the courts themselves.[25] The courts also recognized that this concern may be heightened where, as in the context of a request for vacatur, the litigants are asking courts to destroy a public good—precedent—in order to satisfy purely private needs. Finding that the two interests could not be reconciled, courts ultimately concluded that requests for vacatur are impermissible.[26]

Courts considered similar issues when confronted with party requests for summary jury trials. Summary jury trials are designed to provide parties a realistic assessment of their likely success at trial in order to encourage parties to settle before trial. Yet summary jury trials are closely connected to the judicial system. The summary jury trial is conducted by a state or federal judge with a jury drawn from the existing jury pool.[27] In this sense, summary jury trial is an expansion of the use of the jury. As Richard Posner noted in his article on summary jury trials, "[j]ury service is... a form of

22. *See, e.g.*, Manufacturers Hanover Trust Co. v. Yanakas, 11 F.3d 381 (2d Cir. 1993); National Union Fire Ins. Co. v. Seafirst Corp., 891 F.2d 762 (9th Cir. 1989); *In re* Memorial Hosp. of Iowa County, Inc., 862 F.2d 1299 (7th Cir. 1988); Nestle Co., Inc. v. Chester's Market, Inc., 756 F.2d 280 (2d Cir. 1985).

23. FED. R. CIV. P. 60(b) provides the federal courts with explicit authority to modify prior judgments. *See also*, *Nestle Co.*, 756 F.2d at 282; Klapprott v. United States, 335 U.S. 601, 614-15 (1949).

24. *See, e.g.*, *Yanakas*, 11 F.3d at 384; *National Union*, 891 F.2d at 762; *Nestle Co.*, 756 F.2d at 283.

25. *See, e.g.*, In re *Memorial Hosp. of Iowa County*, 862 F.2d at 1302; *In re* United States, 927 F.2d 626, 628 (D.C. Cir. 1991); Clarendon Ltd. v. Nu-West Indus., Inc., 936 F.2d 127, 129 (3d Cir. 1991).

26. *See, e.g.*, *Yanakas*, 11 F.3d at 385; U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 23-24 (1994); *Nestle Co.*, 756 F.2d at 284.

27. *See In re* NLO, Inc., 5 F.3d 154, 156 (6th Cir. 1993).

conscription; and conscription is not popular in this country."[28] That jury service is analogous to involuntary servitude prompted courts to exercise caution in empaneling jurors for purposes other than those for which they were originally intended. In other words, before allowing the parties to utilize the summary jury trial process, courts first considered whether they had the authority to use the granted power to grant the parties' request.[29] Second, the court considered whether the use of the power undermined the institutional integrity of the courts.[30] An examination of the summary jury trial suggests that both the question of whether authority exists to conduct the trial and whether to empanel jurors for non-traditional purposes are grave concerns courts feel obligated to address.

Somewhat surprisingly, despite the fact that the courts were facing similar issues in both types of cases—how to treat a request for non-traditional judicial involvement—and despite the fact that the courts adopted largely indistinguishable methods for addressing these issues, courts have failed to recognize those similarities or expand upon them to create a uniform judicial treatment of such requests.[31] In this article, I propose such a uniform treatment. I suggest a two-prong test for courts faced with requests for non-traditional judicial involvement. First, the court must consider whether Congress granted it the authority to approve the parties' requests. In other words, would approval of the parties' request be consistent with the court's statutory and constitutional mandates? Second, the court must evaluate whether approval of the parties' request will impermissibly undermine the institutional integrity of the court.

28. Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 386 (1986).

29. *See, e.g.*, Hume v. M & C Management, 129 F.R.D. 506, 506 (N.D. Ohio 1990); In re *NLO*, 5 F.3d at 157.

30. *See Hume*, 129 F.R.D. at 508 n.4.

31. Interestingly, at least one judge, Judge Frank Easterbrook of the Seventh Circuit, has recognized a connection among some of these devices, analogizing the process for court review of a request for vacatur to the process a court uses to approve a consent decree. *See In re* Memorial Hosp. of Iowa County, Inc., 862 F.2d 1299, 1300-01 (7th Cir. 1988) ("Just as it is inappropriate to approve a consent decree with calls for a profligate commitment of the court's resources, so it may be inappropriate to approve a settlement that squanders judicial time that has already been invested."). Professor Judith Resnik has also noted similarities between consent decrees and requests for vacatur. *See* Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1513 (1994). Professor Resnik suggests that consent decree requests are similar to vacatur requests because both occur at the prompting of the parties and are ambiguous in their effects. *See id.*

Application of the second prong of the test may require examination of several factors including impact on third parties, demand on public time or resources, and effect on the court's institutional stature. Of course, the second prong will rarely yield a positive result. It will, however, force the court to consider, and balance, the competing interests present in every request for a non-traditional exercise of judicial power.

This proposed inquiry has much to recommend it, both on positive and normative grounds. From a positive standpoint, the test describes what courts are already doing when confronted by novel party requests both within and outside the ADR context. Thus, the proposed test both reconciles decisions from separate areas of the law, and also proposes a framework that courts have proven able to implement. The proposed test is defensible on normative grounds as well. A court, as a creature of statute, must look first to a statute to find a source for the power it wishes to exercise. The test, designed to ensure that courts act within their power by identifying a statute that justifies their action, satisfies this concern. The second part of the test, which forces the court to consider whether granting the parties' request undermines the court's stature as a public institution, satisfies a second normative concern, that courts exercising authority ensure the integrity of the court as an institution.

Part I of the Article lays the groundwork for the proposed test, reviewing the methods courts have adopted to evaluate parties' agreements to expand judicial obligations in other areas—specifically, summary jury trials, consent decrees, requests for vacatur, and parties' consent for a Federal Magistrate to act as an arbitrator. The examination of how courts treat parties' choices that, among other things, implicate the court's institutional stature, illuminates both the question of whether parties' choices in arbitration and mediation should be enforced and whether parties' requests for non-traditional exercises of judicial power should ever be granted. Part II of the Article proposes a method for evaluating party requests for non-traditional exercises of judicial power drawn from the courts' jurisprudence in other areas of the law. Part III examines arbitration, primarily because at the present time managerial litigants are focusing their efforts to gain control over the court system in that area. Part III first explains how judicial review became part of the arbitral process, and then discusses the varying approaches courts have taken to the question of whether parties to an arbitration agreement may contract for greater review of arbitral awards than the FAA provides.

Finally, Part IV of the Article will apply the proposed test to parties' requests for expanded judicial review of arbitral awards and demonstrate that the current jurisprudence in that area, which places no limitations on parties' ability to control the arbitral process, is flawed.

I. Federal Court Treatment of Non-Traditional Requests for Judicial Power

Managerial litigants have attempted to obtain non-traditional exercises of judicial power in at least four distinct but related ways: requests for issuance of consent decrees, for conducting summary jury trial, for vacatur of a lower court judgment following settlement on appeal, and for a magistrate to act as an arbitrator. Despite the similarities among these requests, courts have made little effort to synthesize the case law in order to develop a unified approach to party requests. Moreover, courts have failed to acknowledge that the analyses courts currently use to evaluate whether they should grant party requests are remarkably similar. An examination of the judicial approaches to each type of party request will demonstrate that courts identify two main issues when evaluating party requests. First, the court considers whether a statute or rule permits the nontraditional use. Second, courts balance a number of factors in deciding whether to grant the request. Among other factors, courts focus on whether enforcement of the parties' agreement will result in unprincipled decision-making, as by misallocating judicial resources or undermining institutional integrity.[32]

A. Consent Decrees

An analysis of judicial treatment of consent decrees provides a useful analogy that will assist courts in determining whether to grant parties' requests for non-traditional exercises of judicial power. A consent decree is a settlement agreement, typically containing injunctive relief, which the judge agrees to enforce as a judgment.[33]

32. *See infra* discussion of judicial treatment of summary jury trial requests, requests for entry of a consent decree and requests for vacatur.

33. *See* Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291, 292 (1988); Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203, 207 (1987). If parties are not interested in obtaining injunctive relief, they may nevertheless file their settlement with the court. At the parties' request, the court may agree to retain jurisdiction over the case to ensure that the damages are paid. The court's discretion to reject the parties' settlement, known as a

As such it has a "dual character": it is both a contract and judgment.[34] A consent decree is like a contract because it reflects the agreement of the parties.[35] Yet, a consent decree is not merely a contract because it is an exercise of federal power, enforceable via a contempt order.[36] In that respect, it is more like a judgment. The treatment of consent decrees as a hybrid of contract and judgment has created controversy over whether courts have authority to enter consent decrees and, if so, what role courts should play in their enforcement.[37]

Consent decrees, at the outset, were creatures of the courts rather than Congress. Courts began enforcing consent decrees long before Congress passed legislation authorizing their issuance.[38] Acknowledging the usefulness of consent decrees in facilitating settlements of complicated cases, Congress has since explicitly authorized the use of consent decrees in the antitrust context.[39] Even where Congressional authorization does not exist, however, courts continue to implement consent decrees.[40]

In cases where Congress has not explicitly authorized the issuance of consent decrees, the parties' agreement is the primary source of the obligations in the decree.[41] Yet the Supreme Court is quite clear that parties cannot, by giving each other consideration, purchase an injunction from a court.[42] Instead, a court may only enforce the parties' agreement if it is within "the general scope of the

consent judgment, is quite limited. *See id.* at 292 n.1.

34. Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986). The dominant modern view is that a consent decree has characteristics both of contract and judgment. *See* Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 324 (1988); Timothy Stoltzfus Jost, *The Attorney General's Policy on Consent Decrees and Settlement Agreements*, 39 ADMIN. L. REV. 101, 101 (1987) (explaining that a consent decree is both a contract and a judgment). Nevertheless, some courts and commentators view the consent decree primarily as a contract, while others view it primarily as a judgment. *See* Kramer, *supra*, at 324.

35. *See* Rabkin & Devins, *supra* note 33, at 207.

36. *See id.*

37. *See generally*, Symposium, *Consent Decrees: Practical Problems and Legal Dilemmas*, 1987 U. CHI. LEGAL F. 1-155.

38. *See* United States v. Swift & Co., 286 U.S. 106, 119 (1932); United States v. ITT Continental Baking Co., 420 U.S. 223, 243 (1975).

39. *See* Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (1982).

40. For example, in the civil rights area, the Supreme Court has approved the use of consent decrees in Title VII cases because they are consistent with the statute's preference for "voluntary settlement of employment discrimination claims." Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 904 (1984).

41. *See* Kasper v. Board of Election Comm'rs, 814 F.2d 332, 338 (7th Cir. 1987).

42. *See* System Fed'n No. 91, Ry. Employees Dept. v. Wright, 364 U.S. 642, 651 (1961).

case made by the pleadings and . . . furthers the objectives of the law upon which the complaint was based.[43] These limitations make sense because "the special force of a consent decree derives precisely from the court's involvement."[44] Thus, parties cannot accomplish by indirection, through their settlement agreement, what they could not have accomplished directly.[45]

Finding the authority to enter a consent decree is not the federal court's only objective when reviewing a consent decree. Assuming that a court has the authority to enter a consent decree, the judge then determines whether the court should enter the decree. Unlike a case where parties privately agree to settle their dispute and ask the court only to dismiss the ongoing litigation, when parties ask the court to approve a consent decree, the court is certifying its willingness to continue involvement in the parties' settlement process and to exercise its judicial power. This continuing involvement and exercise of power "put[s] on the line [the court's integrity]."[46] As a result, although courts are receptive to requests for the entry of a consent decree, the parties' ability to obtain entry of a consent decree is not without limits.[47] To alleviate this concern, before the court will approve the entry of a consent decree, it will typically hold a fairness hearing. During that hearing, the court will focus on whether the decree resolves the litigation at issue, is consistent with the laws and the Constitution, does not have a significant impact on the rights of third parties, and is an appropriate utilization of judicial resources.[48]

43. Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986). The approach outlined in the *City of Cleveland* case was a departure from earlier Supreme Court jurisprudence in which the Court had held that the court's authority to enter a consent decree was limited to those remedies which it could have ordered had it made a decision on the merits. *See Wright*, 364 U.S. at 651.

44. *City of Cleveland*, 478 U.S. at 525.

45. *See* Rabkin & Devins, *supra* note 33, at 209 ("What parties cannot agree to in ordinary contracts, they cannot make binding through consent decrees.").

46. Mengler, *supra* note 33, at 320.

47. *See* Schwarzschild, *supra* note 40, at 887.

48. *See* Kasper v. Board of Election Comm'rs, 814 F.2d 332, 338 (7th Cir. 1987); Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 695-97 (7th Cir. 1986) (en banc); Alliance to End Repression v. City of Chicago, 742 F.2d 1007 (7th Cir. 1984) (en banc); United States v. City of Miami, 664 F.2d 435, 439-42 (5th Cir. 1981) (en banc). Courts also consider whether interests of members of the public whose interests may not be represented by the litigants in front of them have been served. *See Kasper*, 814 F.2d at 338. Some commentators suggest that the fairness hearing is little more than a rubber-stamp of the parties' agreement. *See* Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 47 (explaining that consent decrees are often signed by the judge at the same time the complaint is filed).

The consent decree model identifies one method for balancing litigant interests in imposing on judicial resources for private purposes while still ensuring protection of the public role of the court. Courts evaluating consent decrees first identify a statute or rule that permits the court to approve the party's request. In the consent decree context, the court's authority to enter a consent decree frequently emanates from the very statute upon which the complaint is based.[49] The model further suggests that an evaluation of a non-traditional use of judicial power requires consideration of institutional integrity concerns. That is, before a court enters a consent decree, it must be convinced that issuance would not result in a "profligate commitment of the court's resources,"[50] nor be inconsistent with the Constitution and laws nor have an adverse effect on third parties.[51] This latter inquiry, although not explicitly identified as an integrity review, serves that purpose.

Yet consent decrees are not the only judicial practices that shed light on the question of whether to enforce parties' agreements requesting non-traditional judicial action. Another judicially created device, the summary jury trial, suggests even greater limitations on the parties' ability to demand judicial action, at least where Congress has not authorized the courts to engage in such action.

B. Summary Jury Trial

The summary jury trial, created by Judge Thomas Lambros, a federal district court judge in Ohio, is intended to foster settlement between parties through a process that utilizes judicial resources.[52] The theory underlying the summary jury trial is that parties, following pre-trial discovery and conference, will be more inclined to settle their dispute if they receive a jury evaluation of the strengths and weaknesses of their claims and defenses. At least one commentator has suggested that the summary jury trial is the best alternative mechanism for predicting the outcome of an actual trial.[53]

49. *See, e.g.*, Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) (holding that consent decree must come within general scope of case made by pleadings, and must further the objectives of law upon which complaint was based).

50. *In re* Memorial Hosp. of Iowa County, Inc., 862 F.2d 1299, 1302 (7th Cir. 1988).

51. *See id.*

52. *See* Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789, 798 (1989).

53. *See* William D. Underwood, *Divergence in the Age of Cost and Delay Reduction: The Texas Experience with Federal Civil Justice Reform*, 25 TEX. TECH. L. REV. 261, 313 (1994).

The summary jury trial allows the parties to try an abbreviated version of their case to an advisory jury. The jury is selected from the traditional jury pool.[54] Voir dire is conducted, as it would be in a regular trial, with both sides able to make limited for cause and peremptory challenges. Following jury selection, each attorney makes a formal presentation to the jury. This presentation includes an opening and closing statement and summaries of witness testimony.[55] Once the presentations are completed, the jury deliberates and renders a verdict. Following the issuance of the verdict, the parties are permitted to ask questions of the jurors. At that point, the parties attempt to settle the case based on the new information the jury provided.

At the outset, the vast majority of cases concerning summary jury trials involved challenges to the court's authority to mandate participation in a summary jury trial.[56] While only a few courts and commentators have addressed the propriety of a court approving litigants' joint requests for a summary jury trial, those that have criticize the summary jury trial primarily on the ground that courts do not have the authority to conduct a summary jury trial.[57] A secondary basis for criticism is that even if the summary jury trial process is authorized, it unjustifiably burdens the federal court system because it tends to undermine the court's institutional integrity.[58]

For example, in *Hume v. M & C Management*, the court explicitly held that because there is not legislative authority for utilizing persons as summary jurors, a summary jury trial cannot be conducted in a federal court.[59] In reaching that conclusion, the court

54. *See In re* NLO, Inc., 5 F.3d 154, 156 (6th Cir. 1993).

55. *See id.*

56. *See id.*; Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988); McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 48 (E.D. Ky. 1988); Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987).

57. *See* Hume v. M & C Management, 129 F.R.D. 506, 506 (N.D. Ohio 1990) (holding that court has no authority to use persons as summary jurors); Posner, *supra* note 28, at 386; Underwood, *supra* note 53, at 313; Shirley A. Wiegand, *A New Light Bulb or the Work of the Devil? A Current Assessment of Summary Jury Trials*, 69 OR. L. REV. 87, 115 (1990).

58. *See Hume*, 129 F.R.D. at 507; Posner, *supra* note 28, at 372; Underwood, *supra* note 53, at 313; Wiegand, *supra* note 57.

59. *See Hume*, 129 F.R.D. at 507. While *Hume* was never overruled, following a decision in United States v. Exum, 744 F. Supp. 803 (N.D. Ohio 1990), in which the court held that jurors summoned for a criminal trial had to be discharged from service due to undue influence from having been exposed to the summary jury trial process, Judge Lambros issued a general order relating to juror utilization that expressly authorized use of jurors in a summary jury trial proceeding. *See id.*

rejected Judge Lambros' theory that Federal Rule of Civil Procedure 39(c), authorizing the use of advisory juries, supported the empaneling of summary jurors. According to the *Hume* court, a summary jury is not an advisory jury because it does not advise the judge how to decide the case.[60] The court also rejected the theory that the Jury Selection and Service Act of 1968[61] supported the creation of a summary jury, reasoning that the Act only permits the empaneling of petit and grand juries.[62] Moreover, it found no authority in the Act for extending the jury obligation so as to require citizens to serve as summary jurors.[63] In addition, the court emphasized that the summary jury trial process might serve to undermine the court's institutional integrity. According to the court, the use of jurors in the summary jury trial "could compromise the integrity of the jury system."[64] Judge Posner echoed that sentiment in his article on summary jury trials, stating that "[i]f word got around that some jurors are being fooled into thinking they are deciding cases when they are not, it could undermine the jury system."[65] Finally, the *Hume* court emphasized that the overall efficiency of the summary jury trial has not been established. Thus, utilization of scarce resources to conduct summary jury trials, absent evidence of the summary jury trial's efficiency, may not be appropriate.

The few courts examining litigant requests for summary jury trials have not addressed whether the court's inherent power includes the ability to conduct a summary jury trial. Yet an analysis of the scope of courts' inherent power has been conducted both in cases considering whether courts may mandate participation in summary jury trial and in other cases involving judicial efforts to facilitate settlement. Because a court might cite its inherent powers as justification for granting litigants' request for a summary jury trial, a discussion of the judicial treatment of this issue is relevant.

Only one court has relied on the theory of inherent powers to justify mandatory participation in summary jury trials.[66] In *McKay v. Ashland Oil, Inc.*, the court simply stated that, "mandatory summary jury trials would seem to be within the inherent power of the court."[67]

60. 129 F.R.D. at 509 n.5.
61. 28 U.S.C. § 1861 (1982).
62. *See Hume*, 129 F.R.D. at 509.
63. *See id.*
64. *Id.* at 508 n.4.
65. Posner, *supra* note 28, at 386.
66. *See* McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 48 (E.D. Ky. 1988).
67. *Id.* at 48.

In support of this statement, the *McKay* court cited only one case, *Eash v. Riggins Trucking Co.*[68] Yet *Eash* stands only for the proposition that a court may, using its inherent powers, impose jury costs on parties and attorneys making belated settlements.[69] That courts have imposed jury costs on parties who do not settle quickly hardly supports the proposition that the court's inherent powers include the ability to order a procedure as expensive and complex as a summary jury trial. In the absence of additional reasoning, it is difficult to give much weight to the court's contention that inherent powers include the power to conduct a summary jury trial.

Moreover, other courts have provided considerably more analysis in reaching the conclusion that inherent authority does not justify mandating participation in a summary jury trial. The Sixth Circuit, in In re *NLO*, held both that rule 16 did not authorize mandatory party participation in a summary jury trial process and that the court had no "inherent powers" to authorize such participation.[70] According to the Sixth Circuit, the inherent powers of the court to facilitate settlement should be narrowly construed for fear that to do otherwise would encourage the kind of "judicial high-handedness" that could result in corruption.[71]

Other courts addressing the question agree that while they have the inherent power to manage their own docket, that power should be narrowly construed. Because "[i]nherent power is simply 'another name for the power of courts to make common law when statutes and rules do not address a particular area,'" it is inappropriate to use the notion of "inherent power" as a license for federal courts to do whatever they wish in order to facilitate settlement of a dispute.[72] In other words, to the extent that a court has inherent power, it must be exercised in a manner consistent with the limitations of the law it is charged with enforcing.[73] Thus, exercises of inherent power tend to

68. 757 F.2d 557 (3d Cir. 1985).

69. *Id.* at 568.

70. 5 F.3d 154, 157-58 (6th Cir. 1993).

71. *Id.* at 158 (citing Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 657 (7th Cir. 1989) (Posner, J., dissenting)). While the Sixth Circuit's position on Rule 16 changed following the 1993 amendments, the *NLO* court's holding that "[r]eliance on the pure inherent authority of the court [to justify mandatory summary jury trials] is... misplaced" is still binding precedent. *See* State of Ohio v. Louis Trauth Dairy, Inc., 164 F.R.D. 469, 470 n.1 (S.D. Ohio 1996).

72. *Heileman*, 871 F.2d at 666 (Manion J., dissenting) (citing Soo Line R.R. Co. v. Escanaba & Lake Superior R.R. Co., 840 F.2d 546, 551 (7th Cir. 1988)).

73. *See* Thomas v. Arn, 474 U.S. 140, 148 (1985) (discussing the Court's "supervisory power" which is the label given "inherent power" in the criminal context).

be quite circumscribed and focus primarily on attempts to punish abuses of the judicial process.[74]

Analysis of judicial treatment of summary jury trials suggests that, in the absence of congressional authorization, even voluntary agreements requesting court action may be invalid and unlawful. This analysis also demonstrates that, in the absence of legislative authorization, neither the court's inherent power nor its power to facilitate settlement is sufficiently broad to authorize it to engage in a process simply because it results in a perceived increase in efficiency, particularly when the exercise of such power would be inconsistent with the limitations placed on the exercise of the court's power by existing rules and statutes. Finally, an analysis of the judicial treatment of summary jury trials suggests that even when a new process might improve the court's overall efficiency, courts should be hesitant to implement a process that imposes heavy burdens on the courts, and, at the same time, may tend to undermine the integrity of the judicial process.[75]

C. Requests for Vacatur

Until the Supreme Court rejected the practice in 1994,[76] parties often agreed to settle their disputes on the condition that the appellate court vacate the lower court judgment.[77] Traditionally, courts justified their decision to vacate a prior judgment on the basis of Federal Rule of Civil Procedure 60(b).[78] Yet rule 60(b) contains no explicit language authorizing courts to honor parties' requests for

74. *Heileman*, 871 F.3d at 651 n.4 (citing Newman-Green, Inc. v. Alfonzo-Larrain R.R., 854 F.2d 916, 921-22 (7th Cir. 1988) (en banc)).

75. *See* Hume v. M & C Management, 129 F.R.D. 506, 508 n.4 (N.D. Ohio 1990). Of course, the imposition on the court's resources as well as on the interests of third parties is much more significant in a summary jury trial than it would be in the arbitration setting. While this argues for more permissive treatment of parties' requests to expand judicial review of arbitral awards, there is little question that such requests impose some burden on the federal court system. Moreover, as with the summary jury trial, the courts' inherent power is not sufficiently broad to include the ability to review arbitral awards on any basis the parties select.

76. *See* U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 25-26 (1994).

77. *See* Nestle Co. v. Chester's Mkt., Inc., 756 F.2d 280, 281 (2d Cir. 1970); National Union Fire Ins. v. Seafirst Corp., 891 F.2d 762, 763 (9th Cir. 1989); *In re* Memorial Hosp. of Iowa County, Inc., 862 F.2d 1299, 1302 (7th Cir. 1988).

78. Rule 60(b) states, in pertinent part, "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (6) any ... reason justifying relief from the operation of the judgment." Nestle Co. v. Chester's Mkt., Inc., 596 F. Supp. 1445, 1449 (D. Conn. 1984).

vacatur. Nevertheless, courts were quite willing to read rule 60(b) as conferring broad discretion on courts to grant vacatur requests when made.[79]

In deciding whether to honor the parties' request to vacate the underlying decision, courts confronted the tension between their strong interest in facilitating settlement and the concern that routine vacation of judgments would undermine the court's integrity. Judicial integrity might be jeopardized if requests to vacate were granted, because the court's decisions are public acts, entered by public officials. As such, they have an independent value both as precedent for the parties to the lawsuit as well as to third parties.[80] More importantly, as public acts, they were created at a cost to the public and other litigants. Since they do not belong to the parties alone, they should not necessarily be used as "bargaining chips" in the settlement process.[81] While some courts granted the requests to vacate on the ground that the underlying decision and its fate belongs to the parties,[82] other courts refused such requests, at least in the absence of an opportunity to evaluate independently the wisdom of the decision to vacate.[83] Only through an independent evaluation, the theory goes, could a court properly consider whether the decision ought to stand, even if that meant the parties could not reach settlement of their underlying dispute.[84] According to Judge Easterbrook, "[w]hen the parties' bargain calls for judicial action, however, the benefits of the settlement to the parties are not the only desiderata."[85] Analogizing to consent decrees, Judge Easterbrook concluded that judges should not automatically approve requests for vacatur; rather, they should "ensure that the agreement is an appropriate commitment of judicial time and complies with legal norms."[86]

79. *See id.* at 1449-50; Klapprott v. United States, 335 U.S. 601, 614-15 (1949). A decision to grant a vacatur request is reviewed under an abuse of discretion standard. *See Nestle Co.*, 756 F.2d at 282.

80. *See U.S. Bancorp Mortgage Co.*, 513 U.S. at 24 (holding that judicial precedents are "not merely the property of private litigants" and have value to the legal community).

81. *See* In re *Memorial Hosp.*, 862 F.2d at 1302.

82. *See In re* Federal Data Corp. v. SMS Data Prods. Group, Inc., 819 F.2d 277 (Fed. Cir. 1987) (holding that vacatur should be granted in all cases that are settled); *Nestle Co.*, 756 F.2d at 284 (holding that litigants' interest in settlement outweighs the nonmutual preclusion interests of third parties).

83. *See* In re *Memorial Hosp.*, 862 F.2d at 1300-01.

84. *See id.*

85. *Id.*

86. *Id.* Judge Easterbrook continued, "[j]ust as it is inappropriate to approve a consent decree that calls for a profligate commitment of the court's resources, so it may be inappropriate to approve a settlement that squanders judicial time that has already been

The Supreme Court has since agreed, holding that the value of precedent, judicial integrity, and the importance of discouraging collateral attacks on judgments were all legitimate bases upon which a court could refuse to vacate a judgment at the parties' request.[87] The *Bonner Mall* case is somewhat different than the traditional request for vacatur case in that it involved a request to vacate a court of appeals decision rather than a decision of the district court and because only one party requested the vacatur.[88] Nevertheless, the Court's belief that the value of the judicial process and the importance of the role of precedent outweighed the party's interest in settlement would seem equally applicable in cases where both parties made the request and the decision to be vacated had been made by a federal district court rather than an appellate one. Thus, it would seem unlikely that future courts would honor a request for vacatur.

Applying the request for vacatur analysis to other cases involving requests for non-traditional judical action suggests that congressional authorization for the action is necessary before a court may entertain a request.[89] Once authorization is established, an independent judicial evaluation of the request may need to be conducted. During this evaluation, the court would consider the extent to which the parties' request undermines the institutional integrity of the courts by imposing costs on third parties or the court or by devaluing precedent. Yet the vacatur analogy is imperfect. Many of the factors influencing the decision to conduct an independent judicial evaluation of a vacatur request, risk of creating an incentive to attack judgments collaterally and risk of devaluing precedent, do not seem to apply in other contexts.[90]

Thus, a conclusion that an independent judicial evaluation should always occur before litigants' requests are granted would seem inappropriate. Perhaps the element that unifies the vacatur requests and the other kinds of requests is that all raise a concern about the

invested." *Id.* at 1301.

87. U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994).

88. In dicta, the Court suggested that its reasoning should apply equally to cases where both parties seek vacatur because the parties' shared interest does not undermine appellant's voluntary abandonment of his appeal. The Court also observed that its reasoning should apply to requests for vacatur made at the court of appeals level. *Id.*

89. *See* Nestle Co. v. Chester's Mkt., Inc., 596 F. Supp. 1445, 1449 (D. Conn. 1984).

90. Of course, in the vacatur context, the factors the court evaluated weighed so heavily against granting the parties' request that the Court ultimately concluded that a blanket prohibition against granting vacatur requests was appropriate. Nevertheless, the concept of an independent judicial evaluation may make sense as applied in other contexts as a means for balancing the factors for and against granting a particular request.

importance of maintaining the institutional integrity of the courts. Viewed at that level of generality, then, the conclusion that requests that impair or undermine the institutional integrity of the courts should be rejected seems apt.

D. The Federal Magistrates Act

Unlike the consent decree, summary jury trial, and request for vacatur, the process for pursuing a case through a magistrate rather than in the district court is outlined in detail in legislation.[91] Once a district court obtains the parties' consent, the Federal Magistrates Act provides that a district court may delegate the power to conduct any or all proceedings in a jury or nonjury civil matter to the magistrate for decision.[92] This delegation may occur at the parties' request or at the court's initiative. If the parties consent, the magistrate has the power to hear the case and order the entry of judgment. Appeals from the magistrate's decision may be heard either by the district court or the court of appeals.[93]

At the outset, attacks on the constitutionality of the Federal Magistrates Act were common.[94] Upon receiving an adverse decision from a magistrate, a party would challenge the authority of the magistrate to hear the case, asserting that allowing magistrates to preside over and enter judgment in federal cases violated Article III of the Constitution, which vests the judicial power of the United States in the federal courts and provides life tenure for federal judges. Ultimately, courts concluded that the Act was constitutional for one or more of the following three reasons. First, courts noted that Article III was not implicated because the Act required that the parties and the district court consent to the transfer of the case to the magistrate before it could be transferred.[95] Second, courts emphasized that Article III was not violated because the district court retained extensive administrative control over the magistrate.[96] Finally, courts determined that the continuing availability of the

91. *See* 28 U.S.C. § 636 (1998).

92. 28 U.S.C. § 636(c)(1) (1998).

93. *See* 28 U.S.C. § 636(c)(3) (1998).

94. *See, e.g.*, Collins v. Foreman, 729 F.2d 108, 109 (2d Cir. 1984); Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1038 (7th Cir. 1984); Goldstein v. Kelleher, 728 F.2d 32, 34 (1st Cir. 1984).

95. *See* Sinclair v. Wainwright, 814 F.2d 1516, 1519 (11th Cir. 1987); Gairola v. Commonwealth of Va. Dept. of General Svcs., 753 F.2d 1281, 1284-85 (4th Cir. 1985).

96. *See* United States v. Raddatz, 447 U.S. 667, 682 (1980).

option of an Article III judge to hear the case cured any potential Article III defects.[97]

Parties have attempted to alter the magistrate's role in the judicial system in the same way that they have tried to alter the court's role elsewhere. In *DDI Seamless Cylinder Int'l v. General Fire Extinguisher Corp.*,[98] parties in a breach of contract case that had been assigned to a magistrate attempted to settle the case, using the magistrate to facilitate their negotiations. When negotiations reached impasse, the parties decided to appoint the magistrate as an arbitrator.[99] Acting as an arbitrator, the magistrate found in favor of the plaintiff. The defendant appealed, arguing that the parties did not have the power to appoint the magistrate as an arbitrator. The Seventh Circuit agreed that acting as an arbitrator is not part of a magistrate's job description, but upheld the magistrate's decision on other grounds.[100]

Unlike other statutes examined in this section, 28 U.S.C. § 636 provides significant detail, carefully outlining a magistrate's job duties. A review of 28 U.S.C. § 636 suggests that while a magistrate may enter a judgment, she may not enter an arbitration award.[101] The

97. *See Geras*, 742 F.2d at 1042.

98. 14 F.3d 1163, 1164 (7th Cir. 1994).

99. The parties drafted an order that articulated the agreed procedure for the arbitration. The parties were to select an independent auditor to determine the actual losses each party sustained when General Fire repudiated its contract to purchase a large amount of metal cylinders used in fire extinguishers from DDI. If either party disagreed with the auditor's findings, the magistrate would retain jurisdiction to arbitrate the dispute and make a decision that would bind the parties. *See id.*

100. *See id.* at 1168.

101. 28 U.S.C. § 636(b) outlines the various activities in which a magistrate judge may engage. For example,

> a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

Id. Section 636(b) goes on to describe more activities in which a magistrate may participate. Although Congress never explicitly confers power on a magistrate to act as an arbitrator, section 636(b)(3) allows a magistrate to be assigned such additional duties "as are not inconsistent with the Constitution and laws of the United States." This provision would seem to allow a federal court to assign additional duties to the magistrate but does not seem susceptible of an interpretation that would allow parties to request that the magistrate engage in additional duties. *But see* Ovadiah v. New York Ass'n for New Ams., 1997 WL 342411, at *10 (S.D.N.Y. June 23, 1997) (suggesting that the Supreme Court broadly interprets section 636(b)(3) and that section 636 does not "expressly foreclose" the possibility that a magistrate judge could act as an arbitrator).

Seventh Circuit, in analyzing parties' request that a magistrate act as an arbitrator, provides a thorough explanation of why this is the case. As the court correctly points out, if a magistrate could act as an arbitrator, a conflict of interest would develop. On day one, the magistrate would act as a magistrate and encourage the parties to arbitrate. On day two, he would act as an arbitrator and resolve the dispute. Then, on day three, "wearing his magistrate's hat" again, he would confirm the arbitration award.[102] As the court emphasized, this process is "so remote from the procedures that federal judicial officers are authorized to use that the final order emanating from it might well be void" and therefore unappealable under Article III.[103] Moreover, the magistrate's confirmation of the arbitration award he previously issued would be a clear conflict of interest and, as such, a threat to the integrity of the judicial system.

No other courts have addressed the question of whether the parties may consent to employ a full-time magistrate as an arbitrator. Yet at least one other court sensibly approved the analysis used in *DDI Seamless Cylinder*. In *Hameli v. Nazario*,[104] a Delaware district court cited *DDI* with approval when it considered whether the parties could agree to have a magistrate act as a hearing officer to make a final and unappealable determination of plaintiff's wrongful discharge claim. While the *Hameli* court decided that issue on other grounds,[105] the court agreed that "arbitration is not in the job description of a federal judge, including (see 28 U.S.C. § 636) a magistrate judge."[106]

Applying the analysis of the magistrate statute to the issue of whether parties may agree to nontraditional exercises of judicial action sheds light on the question of whether courts should grant such requests in the absence of Congressional authorization. In all of these cases, parties have agreed to have a third party neutral do something that Congress has not explicitly authorized him to do. In the magistrate case, inconsistency of the request and the statutory scheme was correctly considered fatal—a magistrate's arbitral award cannot be enforced because a magistrate judge does not have the authority to act as an arbitrator. Thus, the inconsistency of a request with the existing statutory scheme suggests that it should be rejected. Of

102. *DDI Seamless Cylinder*, 14 F.3d at 1165-66.

103. *Id.* at 1166.

104. Hameli v. Nazario, 930 F.Supp. 171, 181 (D. Del. 1996).

105. The *Hameli* case turned on the fact that the magistrate's hearing encompassed only state law claims over which the federal court had no jurisdiction. In the absence of a basis for supplemental jurisdiction, the court rejected the magistrate's findings. *See id.* at 183.

106. *Id.* at 181 (citing *DDI Seamless Cylinder*, 14 F.3d at 1165).

course, the Federal Magistrates Act contains a thorough statutory scheme not present in many of the other cases. Thus, it may be that the inconsistency of a request within a statutory scheme is fatal only when the statute specifically outlines the limitations on the decision-makers' duties.

II. Appropriate Standards Governing Party Management Authority Over Courts

A review of judicial treatment of party requests for consent decrees, summary jury trials, requests for vacatur and requests for a magistrate to act as an arbitrator indicates that courts generally agree that when evaluating party requests, courts must first identify statutory authority granting them the power to approve the request. Once such authority is identified, courts then adopt a variety of processes designed to ensure that granting the parties' requests does not inappropriately undermine the court system. It is in making this inquiry that courts do not agree on a single method for evaluating party requests. With consent decrees, courts hold fairness hearings; while with requests for vacatur, courts conduct what they label an independent evaluation of the parties' request. The question, then, is what method is best-suited to evaluating the propriety of granting party requests.

Professor Judith Resnik, in an article examining the propriety of granting requests for vacatur, suggested that the decision whether to grant litigants' non-traditional requests depends on when the importance of allowing parties to retain a bargaining chip outweighs "social investments" such as third party interests, the system of stare decisis and the position of courts as institutions within society.[107] In her view, the argument that certain party requests, such as requests for vacatur, are inconsistent with the role of the courts in society, must be rejected not only because similar practices such as the consent decree exist, but also because contemporary law diminishes the role of formal adjudication in favor of a public policy supporting settlement.[108]

Like the various judicial approaches, this approach fails because it ignores the fundamental and immutable role of the court in the judicial process. We may well be in an era that celebrates settlement; nevertheless, fundamental limitations remain that curb a court's

107. Resnik, *supra* note 31, at 1525.
108. *See id.* at 1477.

discretion to grant parties' requests. As Professor Resnik concedes at one point, "[h]owever much judges have blurred the lines between themselves and the host of dispute resolution providers out there, they retain this fundamental and distinguishing attribute: authority."[109] It is this distinguishing attribute that mandates limitations on the court's exercise of power, regardless of the parties' wishes.

Of course, in a private context, parties have substantial freedom, subject to contract limitations, to develop whatever dispute resolution system they want.[110] They can choose whether to utilize rules of evidence or procedure and can select the dispute resolution mechanism of their choice, or create a new method for resolving their dispute. Yet parties' freedom to tailor the decision-making process should be circumscribed when the parties attempt to involve the court. While the court's role in adjudication is somewhat flexible, it can only be stretched to the limits imposed upon it by rule or statute. The idea that the court should balance litigants' interests against other social investments is not a viable theory because such balancing undermines the court's institutional integrity. The court has an immutable obligation to make certain both that it is acting consistently with the authority Congress and the Constitution has granted to it and that it is safeguarding the integrity of the judicial system as an institution.[111] Regardless of parties' interests, the court's obligation to these tenets cannot be compromised.

Because parties' bargains have begun to include requests for courts to exercise public power, a proper framework for reviewing party requests for non-traditional exercises of judicial power in the dispute resolution process must be adopted. The development of such a process is essential not only to address the public policy concerns raised by parties' agreement for judicial involvement, but also for several additional reasons. First, consistent treatment of party requests would not only resolve the question of whether courts

109. *Id.* at 1532.

110. Private ADR is less problematic than the other party requests discussed herein. It is voluntary and consumes few, if any, judicial resources. *See* Posner, *supra* note 28, at 392.

111. While a court must be careful to act constitutionally and within the statutory authority granted to it by Congress, there is no concern in the arbitration context that the courts are exceeding the power granted to them by the Constitution. Whether the courts are exceeding the power granted to them by Congress is a more difficult question. While the language of the FAA suggests that honoring parties' agreements to expand judicial review of arbitral awards is inconsistent with the FAA's judicial review scheme, the language is sufficiently vague that the opposite conclusion is possible. *See* 9 U.S.C. § 10(a) (1992).

should grant party requests to expand judicial review of arbitral awards, but also would create doctrinal consistency for the judicial treatment of all party requests. This development would, in turn, increase faith in the legal system and in the continued use of ADR mechanisms. Second, consistent treatment will likely increase the probability that litigants will utilize ADR processes. Variable treatment of party agreements decreases certainty and discourages party use. Third, the approach would likely reduce ambiguity in party requests, which creates unnecessary costs for the courts. Fourth, the approach would reduce the likelihood that the court would undermine its own integrity by approving a request that sanctions illegal conduct or which otherwise undermines the court's dignity.

Any proposed mechanism for evaluating litigant requests must address the potential problems that are raised when a court's enforcement of such requests are predicated on notions of party consent and autonomy. This Article has identified three potential concerns resulting from a court's approval of a non-traditional request for judicial involvement in dispute resolution. First, that approving a request that is inconsistent with an existing statutory scheme would be unlawful. Second, that approving a request that contemplated a non-traditional exercise of judicial power may tend to undermine institutional integrity. Third, that approving a request would impose undue costs on the court and waste the court's scarce resources. At the approval stage, a trial court should be able to eliminate or at least minimize the effects of the first two concerns by utilizing the following two-prong test: (1) Is the litigants' request statutorily permissible? (2) If so, does the litigants' request undermine the institutional integrity of the courts? The third factor, whether the litigants' request imposes undue costs on the courts or third parties should not be utilized in light of the uncertainty that accompanies such an inquiry. Using the waste or conservation of resources as the justification for granting or rejecting parties' requests, without first testing whether judicial assumptions on this score are empirically valid, is too subjective to provide meaningful guidance to the courts or the

A. Does the Statute Permit the Court to Grant the Parties' Request?

Any proposed request must first satisfy existing legal constraints on the exercise of judicial power.[112] In the absence of statutory

112. *See* Posner, *supra* note 28, at 385.

authorization, the parties' request must be rejected. Whether authorization exists is a question that can only be answered using a case by case analysis of relevant statutes.

In the summary jury trial context, for instance, the question was whether a court has statutory authority to empanel summary jurors and conduct a summary jury trial. In the absence of a statute on point, courts turned to various civil procedure rules addressing judicial involvement in settlement in an attempt to determine whether the use of a summary jury trial could be justified. Some courts found justification for the adoption of the summary jury trial process in the court's inherent powers and/or in Federal Rules of Civil Procedure 1 and 16.[113] Other courts rejected these interpretations, holding instead that courts are not authorized to empanel summary jurors.[114]

The question of whether courts have authority to conduct summary jury trials was settled in 1998 when Congress passed the Alternative Dispute Resolution Act of 1998.[115] In that Act, Congress stated that each United States district court "may authorize by local rule the use of arbitration in any civil actions"[116] and defined ADR processes to include "something other than adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy."[117] This definition appears to encompass the use of the summary jury trial. Thus, today there is authority for a court to conduct a summary jury trial.

That Congress deemed it necessary to clarify by legislation that courts have the authority to conduct summary jury trials at the parties' request suggests that the courts holding that summary jury trials were not statutorily authorized had the better of the argument.

113. *See generally* Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988); Federal Reserve Bank v. Carey-Canada, Inc., 123 F.R.D. 603 (D. Minn. 1988).

114. *See* Hume v. M & C Management, 129 F.R.D. 506 (N.D. Ohio 1990).

115. *See* 28 U.S.C. §§ 651-58 (1998). In fact, the issue may have been resolved even earlier. In 1993, Federal Rule 16(c) was amended to read that "[a]t any conference under this rule consideration shall be given, and the court may take appropriate action, with respect to... (9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule...." In the advisory committee notes following the amendment, the drafters explained that the language was intended to allow the parties and the judge to explore whether to use alternative dispute resolution mechanisms, such as the summary jury trial. *Amendments to the Federal Rules of Civil Procedure*, NAT'L L.J., S3, S3-S5 (June 7, 1993).

116. 28 U.S.C. § 651(a) (1998). While summary jury trials are not expressly included within the definition of alternative dispute resolution processes, the definition provided is not limited to the devices listed. That said, the statute might be construed to cover only commonly-used alternative dispute resolution mechanisms.

117. 28 U.S.C. § 651(a) (1998).

Moreover, both the court in *Hume* and Posner in his article presented compelling arguments that neither the procedural rules nor a court's inherent powers enabled courts to empanel summary jurors or conduct summary jury trials.[118] In the absence of statutory authorization, courts should have concluded that they did not have the authority to conduct a summary jury trial.

In the magistrate context, the statutory analysis seemed to follow an *expressio unius est exclusio alterius* theory.[119] Using this tool of statutory interpretation, courts find that omissions from a statute should be understood as exclusions.[120] Moreover, some courts infer that such omissions are intentional.[121] Implicitly applying this theory, the Seventh Circuit found that the statute authorizing federal magistrates described with specificity the job of the federal magistrate.[122] Because that detailed job description did not provide that a magistrate could act as an arbitrator, and because such behavior seemed inconsistent with the job of magistrate, the court rejected the parties' request that the magistrate arbitrate their case. The court seemed to read implicitly into the magistrates act that anything not provided for in the Act was prohibited.

Ultimately, it is the court's job to interpret the applicable statutes to determine whether it has the statutory authority to grant the parties' request. There may be a specific statute, such as the Federal Magistrates Act, that the court may examine. Or the court may have to interpret several statutes or rules to determine whether it has the authority. Because parties' requests tend to expand the court's role in adjudication, a lack of clear authority may, as Judge Posner suggests, be a reason for hesitation.[123]

B. Application of an Institutional Integrity Standard

Once the court has determined that it is permitted to exercise judicial power, it must then address whether the parties have asked

118. *See supra* notes 52-75.

119. "*Expressio unius est exclusio alterius*" means that to express one thing is to exclude others. NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.23, at 304-19 (6th ed. 2000).

120. *See id.* at 307. *See also* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (holding that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies").

121. *See* SINGER, *supra* note 119, § 47.25, at 327.

122. *See* DDI Seamless Cylinder v. General Fire Extinguisher, 14 F.3d 1163, 1165 (7th Cir. 1994).

123. *See* Posner, *supra* note 57, at 386.

for a non-traditional use of judicial power that would undermine institutional integrity. Imagine that the parties to a lawsuit sign an agreement that authorizes the court to decide their dispute by flipping a coin. If such an agreement were enforced, it would undermine the integrity of the court as an institution by making it appear that courts exist to serve the whims of litigants and make decisions without regard to legal precedent. While courts exist in part to protect litigants' rights, they can achieve that goal only if the public respects the courts' authority. If courts begin to make decisions in an arbitrary manner, as by deciding cases by the flip of a coin rather than by consulting precedent, or by tricking citizens into thinking their decisions as jurors count when they do not, the respect the public currently has for the judiciary as a decision-maker will be dissipated. To ensure the institutional integrity of the courts, then, courts must act as principled decision-makers. The court's role as a principled decision-maker requires it to reject party requests that tend to undermine the court as an institution.

Some courts already implicitly consider the impact of a particular request on "institutional integrity" before they grant the request.[124] This Article suggests that courts evaluating party requests make this inquiry explicit—examining every party request to determine if it requires the court to act as an unprincipled decision-maker. At first glance, this inquiry might appear amorphous. Yet courts have successfully utilized the institutional integrity concept in several areas of law. For example, some courts evaluating litigant requests have cited "institutional integrity" as the justification for using their inherent power to guard against abuses of the judicial process.[125]

124. *See, e.g.*, Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648, 651 (7th Cir. 1989) (holding that the court's inherent powers may be used to preserve the integrity of the judicial process); Hume v. M & C Managment, 129 F.R.D. 506, 507 (N.D. Ohio 1990) (ruling that the use of summary jurors could compromise the integrity of the judicial system); Grynberg Prod. Corp. v. British Gas, P.L.C., 867 F. Supp. 1278, 1286 app. A (E.D. Tex. 1994) (holding that federal court enforcement of settlement agreements is limited to cases where breach of agreement challenges the institutional integrity of the court).

125. Courts also use the term "institutional integrity" in other contexts. For example, courts cite "institutional integrity" when discussing whether a non-Article III court can hear a case traditionally resolved by an Article III court. Thus, in *Commodities Futures Trading Comm'n v. Schor*, the Court held that allowing an administrative agency to hear a private law claim would not threaten the "institutional integrity" of the judicial branch and was therefore constitutionally permissible. In this context, then, the Court's use of the phrase "institutional integrity" is designed to ensure that the judicial branch, as one of the three powers constituting the federal government, is not undermined by other institutions attempting to perform functions reserved to the judicial branch by the Constitution. *See* Commodities Future Trading Comm'n v. Schor, 478 U.S. 833, 850-56 (1986).

Thus, courts issue contempt citations, sanctions, default judgments and dismissals in order to protect the integrity of the court as an institution. In other instances, courts cite institutional integrity to reject party requests that would undermine the position of respect the court as an institution currently maintains. Thus, institutional integrity is offered as one of the reasons not to allow courts to empanel summary jurors.[126]

The court's unstated goal in applying an integrity standard is to ensure that parties obey judicial authority and respect judicial decision-making power. In other words, institutional integrity is the phrase courts utilize when they are concerned that particular action by a litigant would serve to undermine public confidence in the judicial system. If the institutional integrity of the courts is threatened—as it might be if parties are permitted to dictate to the courts how they are to make decisions—the public may lose respect for the court as a principled decision-maker. Following the parade of horribles to its logical conclusion, the consequence of this loss of faith would be future unwillingness to abide by judicial decisions and, ultimately, anarchy.

Adoption of an institutional integrity review should ensure that courts systematically consider whether a particular request threatens the court's institutional stature. If courts routinely engage in such inquiries, party proposals will be given the scrutiny they deserve and courts will have a basis for rejecting party requests that would embarrass the court or in any other way undermine the court's position as a principled decision-maker.

C. Courts Should Not Consider Whether the Parties' Request Wastes or Conserves Scarce Judicial Resources

In evaluating litigant requests, courts often consider how the request will impact the court's scarce resources.[127] In making this determination, the court attempts to balance how much the litigants' request will increase costs in the short term by requiring greater court involvement with the savings that increased settlement rates will bring over the long term. Although a court may ultimately draw a conclusion about whether the request is an appropriate allocation of

126. *See Hume*, 129 F.R.D. at 508 n.3 (citing Richard Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986) (explaining that summary jury trial may undermine judicial system by causing jurors to become less conscientious)).

127. *See generally* Kasper v. Board of Election Comm'rs, 814 F.2d 332 (7th Cir. 1987); *In re* Memorial Hosp. of Iowa County, Inc., 862 F.2d 1299, 1300-01 (7th Cir. 1988).

the court's scarce resources, it is often quite difficult to comprehend the reasons underlying the court's decision. Perhaps that is because the court's "decision" on this issue is little more than an educated guess about the likelihood that a particular mechanism will increase settlement rates. While one might be inclined to criticize the courts for adopting a method so devoid of reason, it is hard to condemn them since for some time, many commentators and courts have assumed that any mechanism designed to settle cases would save courts money.[128] In fact, it is no longer clear that such an assumption is warranted. For example, Judge Posner's empirical study of the summary jury trial (which he described as "crude") suggested that summary jury trials waste court resources because settlement rates may not increase sufficiently to offset the increased costs.[129]

Until there are empirical studies supporting the hypothesis that litigants' requests are an efficient use of court resources, courts should not base decisions to grant such requests on the theory that the request might conserve court resources. Some of the existing literature analyzing whether particular ADR mechanisms conserve or waste court resources may assist in understanding why courts should not consider the resources issue. That reasonable minds appear to differ greatly in their assessment of whether particular litigant requests for non-traditional exercises of judicial power are efficient suggests that a resources inquiry would be futile.

For example, two eminent law and economics scholars have offered opposing views regarding the efficacy of requests for vacatur. According to Judge Winter of the Second Circuit, a decision not to vacate a judgment wastes both the litigants and the court's resources by requiring the continuation of litigation that could have been settled.[130] Thus, requests for vacatur should be granted because they

128. *See* Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 16 (1990) (discussing the remarkably high settlement rates when summary jury trial is used); Kramer, *supra* note 34, at 328 (stating that in the absence of empirical evidence, the "better assumption" is "that consent decrees are worth the effort needed to enforce them").

129. Posner, *supra* note 57, at 377; *see also* Wiegand, *supra* note 57, at 101-02 (writing that summary jury trials are a waste of resources if the case would have settled anyway).

130. *See* Nestle Co., Inc. v. Chester's Mkt., Inc., 756 F.2d 280, 284 (2d Cir. 1985). Professor Resnik noted that Federal Circuit judges adopted Judge Winter's position, asserting that refusing to vacate as a condition of parties' settlements is both "unjust" to the parties and "wasteful of the resources of the judiciary." Resnik, *supra* note 31, at 1522 (citing Federal Data Corp. v. SMS Data Prod. Group, Inc., 819 F.2d 277, 280 (Fed. Cir. 1987)).

save court resources.[131] By contrast, Judge Easterbrook, analyzing the same problem, came to the opposite conclusion.[132] He reasoned that rejecting requests for vacatur creates an incentive for parties to settle their cases before judgment.[133] Even if the parties do not settle, the incremental additional costs to the parties and the judiciary to go to judgment and hear an appeal do not justify the request for vacatur practice in light of its abundant shortcomings. Moreover, Easterbrook suggests that costs to future litigants and courts will be avoided if the vacatur practice is rejected since they can rely on the precedent set by the parties who are not permitted to vacate the court's judgment.[134]

Under the Winter theory, vacatur is efficient. The costs the judiciary incurs by approving requests for vacatur do not outweigh the benefits of facilitating settlement. After all, the court saves the cost of an appeal and is confronted only by the threat of costs that might be incurred if future litigation on the same subject arises. Yet under Easterbrook's approach, vacatur is inefficient. If a party can file a motion for vacatur, an incentive to settle early may be lost. Moreover, granting a vacatur request will save few court resources. Occurring as they do after a final judgment is rendered, granting a vacatur request saves only the cost of hearing an appeal. Moreover, if future litigation on the same subject transpires, the minimal resources conserved by avoiding the appeal may well disappear and additional costs may accrue. Although Winter characterizes the likelihood of future litigation as a "nebulous threat," the fact that one party is intent upon eliminating precedent suggests that the judgment vacated involves a dispute that is fairly likely to be litigated again in the future. Thus, resources expended are greater than those saved.[135]

131. *See Nestle Co.*, 756 F.2d at 284.

132. *See* In re *Memorial Hosp.*, 862 F.2d at 1302.

133. *See id.* at 1303. Another commentator agreed that granting vacatur requests may discourage early settlement because a party might proceed to judgment with the intent of obtaining a settlement conditioned upon vacatur of the judgment in order to preserve the right to relitigate, if necessary. Henry E. Klingeman, Note, *Settlement Pending Appeal: An Argument for Vacatur*, 58 FORDHAM L. REV. 233, 244 (1989).

134. *See* In re *Memorial Hosp.*, 862 F.2d at 1303. Another court emphasized that vacatur is problematic because it "provide[s] the dissatisfied party with an opportunity to relitigate the same issues." Ringsby Truck Lines v. Western Conference of Teamsters, 686 F.2d 720, 721 (9th Cir. 1982). Obviously, relitigation increases costs.

135. *See Ringsby*, 686 F.2d at 721; William D. Zeller, Note, *Avoiding Issue Preclusion by Settlement Conditioned upon the Vacatur of Entered Judgments*, 96 YALE L.J. 860, 868 (1987) (explaining that a wealthy party may forego settlement for trial knowing it may obtain vacatur as a term of settlement, allowing subsequent relitigation).

What this analysis demonstrates is that it is difficult to draw a firm conclusion about the efficacy of the vacatur practice in the absence of empirical evidence. Posner's analysis of the efficiency of the summary jury trial bolsters the argument that resources questions cannot be resolved in the absence of further serious study.

Shortly after the summary jury trial was introduced, Posner conducted a rough empirical study of its effect on settlement rates. The intent of the summary jury trial is to conserve scarce judicial resources by facilitating disposition in those cases where negotiations have reached an impasse.[136] The theory is that litigants who utilize the summary jury trial will be better able to assess their probability of success at trial because they obtain better information about the trial's likely outcome following the summary jury trial.[137] Once they have obtained better information, the theory goes, they are likely to be capable of breaking their negotiation impasse and settling their case.[138] Posner tested this theory by engaging in a limited study of settlement rates in the Northern District of Ohio where the summary jury trial had been used for five years, comparing those rates with rates from the same district before the summary jury trial process was introduced as well as to the Southern District of Ohio and the remaining districts within the Sixth Circuit.[139] After analyzing the data, Posner concluded that the settlement rate in the Northern District of Ohio was not affected by the use of the summary jury trial and, in fact, a decline in the number of cases tried in the Northern District that had begun before the summary jury trial was introduced, stopped after its introduction.[140] As Posner points out, this result is the "opposite of what one would expect if the device raises the settlement rate."[141] Average time from filing to disposition of a civil case did not improve in the Northern District following the summary jury trial introduction, nor did the use of the summary jury trial increase the number of cases terminated.[142] Ultimately, Posner's study suggests that the summary jury trial may not be an appropriate

136. *See* Kaufman, *supra* note 128, at 16.

137. *See* Posner, *supra* note 57, at 371.

138. *See id.*

139. *See id.* at 377.

140. *See id.* at 379 (pointing out that the decline in the number of civil trials in the Northern District began years before the summary jury trial was introduced and "leveled off after its introduction").

141. *Id.*

142. *See id.* at 380 (showing that the average time from filing to disposition went from 6.4 months prior to the introduction of the summary jury trial to 7.8 months following its introduction).

allocation of judicial resources because it may not increase the likelihood of settlement. A device that increases costs for the court without the corresponding benefits of increased settlement is an improvident commitment of judicial resources.

Some commentators have suggested that the summary jury trial process, because it is fairly expensive in terms of court time and other resources, should be reserved for complex cases that would take weeks or months to try.[143] While this may be true, Posner's study does not necessarily support this assumption. According to Posner, the summary jury trial owes its limited success to those judges who decide when and under what circumstances to use it. Posner suggests that if the device were widely utilized, it would be unlikely to result in any significant savings because the maximum savings that could be obtained, given the timing of the summary jury trial, is limited and the increase in number of cases settled is not likely to be high, because these are cases that could not be settled by any other device available.[144]

The summary jury trial experience does not provide much support for the notion that litigant requested non-traditional uses of judicial power are efficient allocations of judicial resources. Given the amount of court time and resources required, in the absence of proof of a high settlement rate, it would seem that a court could reject parties' requests for summary jury trials on the ground that they are not an efficient allocation of judicial resources.

Like the summary jury trial, the consent decree exists to facilitate the settlement of cases that would otherwise go to trial. Settlement would seem to conserve parties' resources, allowing them to obtain more of what they want at a lower cost. Moreover, settlement would seem to conserve the courts' scarce resources, allowing the courts to allocate time to cases that do not settle voluntarily.

The difficulty with this theory is that there is no proof that consent decrees facilitate settlement of cases that would not otherwise settle or that judicial resources are conserved by granting consent decrees. Several years ago, Professor Judith Resnik noted the absence of empirical support for the notion that cases that settle

143. *See* STEPHEN GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES 235 (2d ed. 1992).

144. *See* Posner, *supra* note 57, at 380. Posner cites other studies that support his conclusion such as a Federal Judicial Center study of the summary jury trial suggesting that use of the device did not increase settlement rates. *See id.* at 377-82 (discussing Federal Judicial Center study).

through consent decrees would not have settled otherwise.[145] Moreover, she emphasized the lack of evidence supporting the theory that consent decrees actually conserve judicial resources.[146] While it is true that decrees end the case, parties can return to court to modify the decree, interpret the decree's language, or determine whether there has been a violation of the decree, among other things. Once these potential additional costs are considered, the picture of the consent decree as a cost-savings device becomes muddied.

Some commentators suggest that the lack of empirical evidence supporting the efficiency of consent decrees should not dissuade courts from entering them.[147] According to Professor Larry Kramer, the "better assumption" is that "consent decrees are worth the effort needed to enforce them." Kramer suggests that because consent decrees help settle some cases that would not otherwise settle and are frequently enforced through use of the court's cheap and efficient contempt sanctions process, they should be utilized even in the absence of evidence supporting their efficiency.[148] Kramer also notes that the evidence available supports the theory that consent decrees are an "efficient allocation of judicial resources."[149]

Unfortunately, anecdotal evidence of the efficiency of consent decrees is not strong support for the theory that consent decrees actually conserve judicial resources. While it may be true that consent decrees are a cost-effective device for obtaining settlements, it may also be true that entering the consent decree is but a first step in an on-going process of modification and clarification of the decree. In the absence of empirical evidence, the grant or denial of a consent decree will continue to be made on an ad hoc basis. While this provides little certainty to parties, it is the only path currently available to them.

As with summary jury trials and requests for vacatur, there is no proof that allowing the entry of consent decrees will result in

145. *See* Resnik, *supra* note 31, at 67-69.

146. *See id.* at 70.

147. *See, e.g.*, Kramer, *supra* note 34, at 328; Mengler, *supra* note 33, at 321 (writing that "[b]oth the parties and the judicial system benefit because a consent decree typically consumes fewer resources").

148. *See* Kramer, *supra* note 34, at 329-30.

149. *Id.* (citing Neuborne & Schwarz, *A Prelude to the Settlement of Wilder*, 1987 U. CHI. LEGAL F. 177, 180-81 (1987). *See, e.g.*, Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725 (1986) (describing a case study of three consent decrees); Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11 (1984).

conserving scarce judicial resources. While courts can continue to use resources as a factor to justify their decisions, in the absence of any empirical study supporting the courts' conclusions, to do so would seem to invite challenges on the basis that the courts' actions are unprincipled. Rather than continue to use resources as a justification for granting or rejecting parties' requests, perhaps a better approach would be to consider first whether the parties' request falls within the limits of the courts' authority and second, whether the request requires the court to undermine institutional integrity.

III. Application to Parties' Agreements to Expand Judicial Review of Arbitral Awards

This Article outlines a test that courts could adopt when confronted with party requests for non-traditional exercises of judicial power. Rather than ad hoc determinations, this article suggests a two-part test. First, the court should determine whether there is a statute or rule authorizing it to grant the parties' request. Second, if there is such authority, the court should ask whether the request undermines the court's institutional integrity. If so, the court should reject the request on this ground. At the present time, parties commonly request expanded judicial review of arbitral awards. Application of the test to arbitration should reveal both the test's flaws and its countervailing benefits.

Before applying this test to parties' requests for expanded judicial review of arbitral awards, the Article first examines how judicial review became part of the arbitral process and how courts have addressed parties' requests for application of non-traditional judicial review standards to existing arbitration awards. Next, the Article applies the two-part test to the arbitration problem and concludes that the existing judicial analysis misses essential points about the effect of the parties' agreements on the court's institutional integrity.

A. Evolution of Judicial Review of Arbitration Awards

The issue of expanded judicial review of arbitral awards has arisen only recently. To understand why this is the case, it is important to understand how arbitration is structured and what changes have occurred in arbitration that may have prompted such a development.

(1) Arbitral Structure

The word "arbitration" refers to any arrangement whereby parties agree that a disinterested private party will fashion a binding determination of a dispute that has arisen between them.[150] The parties select the arbitrator who will resolve their case, typically making the selection after the dispute has arisen.[151] The parties' active role in the selection process enables them to choose an arbitrator who is an expert in the subject matter of the dispute.[152] Traditional arbitration also involves flexible procedures. The parties may choose the extent to which they wish to be bound by formal procedural rules and may define their own procedure.[153] Arbitration

150. *See* WILNER, *supra* note 1, § 1.01, at 1. A typical statutory definition of arbitration appears in the Texas statute. According to the statute: "(a) Nonbinding arbitration is a forum in which each party and counsel for the party present the position of the party before an impartial third party, who renders a specific award. (b) If the parties stipulate in advance, the award is binding and is enforceable in the same manner as any contract obligation." TEX CIV. PRAC. & REM. CODE ANN. § 154.027 (1987).

151. *See* WILNER, *supra* note 1, § 20.02, at 308-09. Sometimes the arbitrator who will decide the dispute is named in the contract establishing arbitration as the dispute resolution mechanism. *See id.* § 20.02, at 308. Other times, parties simply state that an arbitrator provider organization, such as the American Arbitration Association, will provide a panel of arbitrators from which an arbitrator will be chosen at the time the dispute arises. *See id.* § 20.01, at 302-03. Of course, even the latter selection method is, at some level of generality, one in which the parties select the arbitrator. They have simply elected to assign their selection powers to an agent.

152. *See* IAN MACNEIL ET AL., FEDERAL ARBITRATION LAW § 2.6.2 (1994) (stating that arbitrator is expected to be an expert in the norms governing the resolution of the dispute); Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974) (noting that parties select a particular arbitrator "because they trust his knowledge and judgment concerning the demands" and customs of the field from which the dispute originates). It may be that in at least some cases, one of the parties will not want an expert to resolve the dispute. A party who has departed from industry norms in his performance, for instance, might prefer an arbitrator who is not an expert in the industry in which the party deals. In litigation, parties theoretically have little or no direct control over the particular judge who will decide their dispute. (Although plaintiffs do, of course, to a large extent control the forum, and thus can direct cases to fora that are perceived as more beneficial to plaintiffs). In arbitration, by contrast, a party might act opportunistically by selecting an arbitrator the party considers predisposed to the particular argument the party will advance. In fact, I have argued elsewhere that the possibility of opportunistic behavior in arbitrator selection provides repeat players, with their better access to historical information, and stronger incentives to influence the arbitrator, a decided advantage in the arbitral forum. *See* Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against the Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 453 (1996).

153. Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 433-34 (1988).

proceedings, for instance, need not follow the rules of evidence and often limit,[154] or even eliminate, discovery.[155]

These flexible procedures typically allow arbitration to proceed more rapidly than traditional courtroom litigation. The time between hearing and result is also shorter than in litigation because arbitrators are not required to publish their decisions, and usually do not.[156] It is also uncommon to have a transcript of the proceedings.[157] Because arbitrators rarely publish their opinions and are not obligated to follow precedent, an arbitral decision can be expected within days or weeks following the arbitration hearing.

154. *See generally* Uniform Arbitration Act § 7 (1955). The proposed revision of the UAA gives the authority to order discovery to the arbitrators, unless the parties' agreement indicates otherwise. *See, e.g.,* Revised Uniform Arbitration Act § 13(a) (Oct. 31, 1997 Draft).

155. *See* JOHN S. MURRAY ET AL., ARBITRATION 217 (1996) (writing that "[a]nother illustration of the relative informality of arbitration is the sharply limited availability of discovery, both pre-trial and at the hearing itself"). The Uniform Arbitration Act does not provide for any form of pre-trial discovery. In fact, only the arbitrator has the power to order "discovery"—he may order it if he believes it is necessary to resolve the dispute. Parties do not have a right to compel discovery. *See id.* at 218 (citing Uniform Arbitration Act § 7). It is interesting to note that parties, when given the choice, tend to agree to eliminate or reduce the amount of discovery, especially in light of the far-ranging discovery that takes place in most formal judicial proceedings. The question emerges why discovery is so different in the two systems. That is, why does our formal judicial system allow for such wide-ranging discovery if it appears that litigants, when left to choose their own rules, opt for less discovery? There are at least two possible explanations for this deviation between the nature of discovery in the public and private dispute resolution systems: [1] little or no discovery is the better rule in cases where parties have an existing relationship (*i.e.*, the typical arbitration case), but broad ranging discovery is more appropriate in non-relationship based cases; or [2] the discovery rules enshrined in the federal rules of civil procedure (and therefore also the civil rules of the vast majority of states) resulted from a process of interest group capture, *i.e.*, by attorneys interested in increasing fees.

156. *See* United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960) ("Arbitrators have no obligation to the court to give their reasons for an award."); *see also* Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 204 (2nd Cir. 1998) (holding that arbitrators have no obligation to explain their award in writing). The American Arbitration Association's Commercial Arbitration Provisions contain a provision requiring that arbitrators provide a written award to the parties, but do not require the arbitrator to explain in writing or otherwise the reasons underlying that award. *See also* EDWARD BRUNET & CHARLES B. CRAVER, ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE 324 (1997) (explaining that only in specialized arbitrations, like labor, international commercial and maritime arbitrations, do arbitrators routinely write opinions); MACNEIL ET AL., *supra* note 152, § 2.6.2, at 2:37 (stating that arbitrators are not required to provide a written opinion with reasons supporting their decision); WILNER, *supra* note 1, § 29.01, at 427 (stating that the parties to the arbitration typically set the time within which the arbitrator must render his award).

157. *See* JOHN S. MURRAY ET AL., PROCESS OF DISPUTE RESOLUTION 640 (2d ed. 1996).

Once the decision is issued, a party may appeal the arbitrator's decision. Judicial review of arbitral awards, however, is quite restricted. The FAA limits the grounds for refusing to enforce an arbitral award to procedural irregularities in the arbitral decision-making process, as when the arbitrator has acted in excess of her authority.[158] Misunderstanding or misapplication of the law are not bases upon which an arbitral award may be reversed.[159]

(2) Traditional Arbitration

Arbitration as we know it was developed by the merchant class in medieval western Europe.[160] In the medieval period, merchants traveled to fairs where they would meet and conduct business with other merchants. Because these fairs occurred far from the merchants' homes, and because the merchants did not stay at any particular fair very long, it was imperative that the merchants create a system to resolve the disputes that would inevitably arise from the business conducted at the fair. Unfortunately, the common law court system was not an appropriate venue for the resolution of these disputes because of its complex and drawn-out procedures.[161] Moreover, the common law courts had little understanding of the customary norms the merchants followed.[162]

Merchants were interested in a system that would resolve disputes (1) quickly (so they could leave the fairs) and (2) in accordance with industry standards (to facilitate continuing relationships among the parties). Arbitration was utilized in order to achieve these twin goals. Thus, the arbitral system permitted parties to appoint a disinterested third party who was an expert in the industry to resolve the dispute in order to ensure that resolution was achieved in accordance with understood customary norms.[163] In

158. *See* 9 U.S.C. § 10(a)(1)-(4) (1994).

159. Federal courts have created additional bases for judicial review of arbitral awards. *See* Hayford, *infra* note 190.

160. An early form of arbitration as a means to resolve disputes was created long before English merchants began to use it. Roman and Greek merchants utilized arbitration to resolve disputes, as did the German and the French. *See* WILNER, *supra* note 1, § 2.02, at 15.

161. *See* Thomas E. Carbonneau, *The Reception of Arbitration in United States Law*, 40 ME. L. REV. 263, 268 (1988) (emphasizing that commercial relationships fared much better under a system that focused on salvaging relationships among the parties rather than on ensuring that stringent procedural safeguards were followed).

162. As Blackstone emphasized, arbitration was useful in settling mercantile transactions that were "almost impossible to be adjusted on a trial at law." 2 WILLIAM BLACKSTONE, COMMENTARIES 17.

163. *See* Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration*

order to ensure finality, so that the parties could return home with relationships intact, the parties also agreed that they would abide by the arbitrator's resolution of the claim.[164]

This process, with its finality and lack of formalism, provided the swift results the parties desired. Moreover, the inability to appeal an arbitral award provided the finality the parties needed to preserve existing business relationships. Interestingly, even if the parties had not agreed that the arbitrator's decision was final, judicial involvement would nevertheless be unnecessary in mercantile arbitration because both parties have an incentive to avoid self-serving behavior.[165] The value of the parties' ongoing relationship, as well as the reputational interest of each party within the industry, vastly outweighs the stakes at issue in any particular case.[166] Thus, parties willingly abided by arbitration decisions in order to preserve their relationship and their respective reputations.

It is not surprising then that the structure of mercantile arbitration was entirely contractual. Allocation of important issues was left to the parties, in part because the regulatory powers were not interested in regulating the arbitration process,[167] and in part because informal marketplace sanctions served the enforcement role that regulation often plays today. Yet market sanctions work best when markets consist of relatively few players with frequent business interactions, thus maximizing the importance of reputational concerns.[168] As the market grew wider and more impersonal, market sanctions became less effective. At that point, the commercial community turned toward the courts to assist them in their efforts to

Agreements, 22 ST. MARY'S L.J. 259, 271 (1990).

164. *See id.*

165. Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 281 (1990).

166. *See* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 149 (1992) (noting that the diamond industry ensures obedience to arbitral awards through reputational sanctions).

167. The English courts in the medieval period had little interest or expertise in commercial disputes. *See* Robert B. von Mehren, *From Vynior's Case to Mitsubishi: The Future of Arbitration and Public Law*, 12 BROOK. INT'L L.J. 583, 583-84 (1986) (suggesting that merchants preferred arbitration to litigation because they believed the King's courts were not well versed in commercial matters).

168. Bruce Mann, in his extensive study of arbitration in pre-revolutionary Connecticut, emphasized the same phenomenon. According to his study, the success of arbitration is dependent on the existence of a community. Once community bonds weaken, community norms are no longer sufficient to ensure compliance with arbitration decisions. When that weakening occurs, the inability of parties to obtain enforcement of arbitral awards in court becomes problematic. *See* Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443 (1984).

bypass the traditional legal system in favor of a more efficient system of arbitration. Unfortunately, until Congress passed the FAA, the courts refused to assist the merchants in this endeavor because they firmly believed that arbitration agreements and awards oust the courts of jurisdiction and, therefore, are unenforceable.[169]

(3) Arbitration After the Federal Arbitration Act

In the United States, as in England, by the early nineteenth century, arbitration had become the standard method for resolving commercial disputes.[170] Yet American courts, following the ouster doctrine,[171] were hostile toward pre-dispute agreements to arbitrate, consistently refusing to enforce them.[172] Arbitral awards received less hostile, albeit inconsistent judicial treatment. Most state courts were willing to enforce arbitral awards as long as nothing "egregious" had occurred during the arbitration.[173] The United States Supreme Court

169. *See* Kill v. Hollister, 95 Eng. Rep. 532 (1746); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 283 (1926). *See also* Frances T. Freeman Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 CORNELL L.Q. 519, 556 (1960) (characterizing courts as hostile to finality of arbitral awards). *But see* MACNEIL ET AL., *supra* note 152, at 4:7 ("[U]nsatisfactory though they may have been, these regular actions of the common law were indeed available at an early date to enforce awards. The judicial hostility . . . respecting agreements to arbitrate did not extend to the enforcement of awards.").

170. Despite judicial hostility toward arbitration, the use of arbitration thrived as long as informal sanctions were effective. For example, in 18th century New York, the hub of commercial activity, the New York Chamber of Commerce established procedures allowing members to submit any disputes to arbitration committees, which were made up of other chamber members. The Chamber used its influence over its membership to ensure the enforceability of both agreements to arbitrate and the subsequently issued arbitral awards. *See* MACNEIL ET AL., *supra* note 152, § 4.3.1.2., at 4:14.

171. "Ouster" is the shorthand term for the belief that arbitration improperly ousts the courts of jurisdiction and is therefore impermissible. *See* Sarah Rudolph, *Blackstone's Vision of Alternative Dispute Resolution*, 22 MEMPHIS ST. L. REV. 279, 290 (1992).

172. *See* Tobey v. County of Bristol, 23 F. Cas. 1313 (C.C.D. Mass. 1845) (No. 14,065) (explaining that common law policy is not to enforce arbitration agreements); Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) (holding that agreements made in advance to oust the courts of jurisdiction are illegal and unenforceable); Mitchell v. Dougherty, 90 F. 639, 642 (3d Cir. 1898) (holding that agreement to oust courts of jurisdiction is unenforceable because the parties cannot "seek to accomplish what the law forbids, the complete abrogation of the authority which it has conferred upon the courts"); Wood v. Humphrey, 114 Mass. 185, 186 (1873) (indicating that because an agreement to arbitrate ousts the courts of jurisdiction, it is void); Trott v. City Ins. Co., 24 F. Cas. 215, 217 (C.C.D. Me. 1860) (No. 14,189); United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1012 (S.D.N.Y. 1915) (holding that arbitral agreement is void as it ousts the courts of jurisdiction); Cocalis v. Nazlides, 139 N.E. 95, 98-99 (Ill. 1923) (holding that an executory agreement to arbitrate is void under an arbitration statute requiring an existing controversy).

173. *See* MACNEIL ET AL., *supra* note 152, § 4.3.2.1, at 4:16. *See, e.g.*, Wilkins v. Allen,

approved this position, stating that "[i]f the [arbitral] award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact."[174]

Yet not all jurisdictions viewed the arbitral award review process favorably. In fact, some state legislatures attempted to alter the traditional arbitral review process. For example, a 1917 Illinois statute attempted to integrate the arbitral system and the courts, providing that arbitrators could decide questions of fact but had to "submit any question of law arising in the course of the reference for the opinion of the court" and that the court's opinion would bind the arbitrators.[175] While the idea underlying this statute was to create a more "perfect service" by letting arbitrators and courts allocate decision-making based on areas of expertise, the reformers who lobbied for the passage of the FAA believed that shifting legal questions away from the arbitrators to the courts was "anathema" and had to be reversed.[176] While the Illinois statute addresses the initial arbitral determination rather than the review of the arbitral award, the statute makes clear that the courts could not review arbitral awards for anything but procedural irregularity.[177]

By the 1920s, most states had rejected the Illinois approach, leaving the determination of legal, as well as factual, issues to the arbitrator and permitting review of arbitral awards for procedural irregularity alone. In New York, for instance, courts were authorized to vacate or modify awards only on the showing of "such circumstances as corruption, partiality, specified kinds of procedural misconduct, and 'where arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award, upon the subject matter submitted, was not made.'"[178]

169 N.Y. 494, 496-97, 62 N.E. 575, 576 (1902) (applying state law, court refused to vacate an arbitral award for mistake of law and noting that so long as the arbitrator does not exceed his jurisdiction, engage in fraud, corruption or other misconduct affecting the award, then the award is final).

174. Burchell v. Marsh, 58 U.S. 344, 349 (1854).

175. Interestingly, the Illinois statute's provisions for judicial review were similar to those contained in the English Arbitration Act of 1889. In that statute, arbitrators were permitted to refer questions of law to the courts and courts were authorized to require arbitrators to do so. *See, e.g.*, English Arbitration Act, 1889, 52 & 53 Vict., Ch. 49, 200 (Eng.).

176. IAN R. MACNEIL, AMERICAN ARBITRATION LAW 33 (1992).

177. Of course, it would be unnecessary to review for errors of law since the arbitrator was not permitted to make legal determinations.

178. MACNEIL, *supra* note 176, at 35 (quoting N.Y. CODE CIV. PROC. § 2374 (Stover 1902)). It is worth noting that the 1920 New York arbitration statute dropped the

Nevertheless, hostility toward pre-dispute arbitration agreements, together with inconsistent state law treatment of the arbitral process, led the merchants and businesspeople interested in a more consistent approach to arbitration to begin a concerted lobbying effort.[179] This effort culminated in the passage of the 1920 New York Arbitration Act and, more importantly the FAA's passage in 1925.[180]

The passage of the FAA was an acknowledgment that a purely private approach was no longer workable in light of the developing concerns about enforceability that the market was no longer addressing. The primary purpose of the FAA was to ensure that pre-dispute arbitration agreements were as valid and enforceable as any other type of contract. To ensure enforcement, Congress included two key provisions. First, the FAA allowed a party to obtain a stay of litigation pending an arbitration pursuant to a valid arbitration agreement.[181] Second, the FAA enabled enforcement of an arbitration agreement by authorizing a party to an arbitration agreement to file in federal district court a motion to compel the other party to arbitrate.[182] The FAA also contained provisions for limited judicial review of arbitral awards, together with provisions articulating the process for vacation or modification of arbitral awards.[183]

Thus, while still restricting judicial involvement, the FAA created a more expansive role for courts than had existed with mercantile arbitration. Unlike mercantile arbitration, "FAA arbitration" is a limited multi-tier dispute resolution process. That is, there were multiple levels of review necessary largely because the market's growth rendered it unable to provide the kind of sanctions necessary to ensure that parties would abide by arbitration agreements.[184] In other words, as informal sanctions became less

provisions for judicial review.

179. *See generally* MACNEIL, *supra* note 176 (describing the history of lobbying efforts by merchants, culminating in passage of New York Arbitration Act and FAA).

180. In a separate work, MACNEIL ET AL. emphasize that modern arbitration legislation, like the FAA, has two basic purposes: "(1) to provide the full legal enforcement needed to make complying [with] arbitration agreements . . . fully effective in the legal sense and to enforce awards as made with only limited judicial review; and (2) to subject arbitration to important, but limited, regulation." MACNEIL ET AL., *supra* note 152, § 5.1, at 5:1.

181. *See* 9 U.S.C. § 3 (1994).

182. *See* 9 U.S.C. § 4 (1994).

183. *See* 9 U.S.C. §§ 10-12 (1994).

184. Bruce H. Mann's Connecticut arbitration research supports this proposition. According to Mann, as trade expanded, so did the number of merchants. The new merchants were not familiar with industry norms. Thus, an increase in the number of

effective, governmental regulation was necessary to ensure the continued enforceability of arbitration agreements and arbitral awards.[185]

(4) Modern Arbitration

Recently, commercial entities have become interested in greater judicialization of arbitration.[186] By this, I mean that they are including in their arbitration agreements provisions that expand judicial review beyond the limits outlined in FAA § 10(a).[187] Why they are doing this is unclear. Perhaps merchants' interest in expanding judicial review of arbitrators' decisions is a response to society's increased skepticism toward arbitration.[188] Or, it may be

disputes arose as did the unwillingness of parties to abide by the resulting arbitral awards. *See* Mann, *supra* note 168, at 472. According to Mann, "these changes in the business community explain the sharp increase in the number of failed commercial arbitrations mentioned in petitions after mid-century." *Id.*

185. *See* Kathleen M. Kelly, *Introduction to the 1997 McGeorge Symposium on Contractual Arbitration*, 29 PAC. L.J. 177, 187 (1998); Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335, 1339 (1996).

186. *See* Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 BROOK. L. REV. 1459, 1459 (1996). Brunet notes elsewhere that companies are more interested in ensuring that an arbitrator correctly applies the law in order to "reduce the risk of an arbitrator deciding the case 'equitably' or arbitrarily." BRUNET & CRAVER, *supra* note 156, at 427.

187. *See* LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997); Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993 (5th Cir. 1995); *see generally* Syncor Int'l Corp. v. McLeland, No. 96-2261, 1997 U.S. App. LEXIS 21248, at *1 (4th Cir. Aug. 11, 1997) (per curiam) (pointing out that parties agreed that arbitration decision would be reviewed for "errors of law"); Westinghouse Elec. Corp. v. New York City Transit Auth., 14 F.3d 818, 822 (2d Cir. 1994) (explaining that parties agree to judicial review of arbitral award under "arbitrary and capricious" standard); New England Utils. v. Hydro-Quebec, 10 F. Supp. 2d 53, 59 (D. Mass. 1998) (stating that parties agreed to judicial review of arbitral award for errors of law); South Wash. Assocs. v. Flanagan, 859 P.2d 217, 219 (Colo. Ct. App. 1992) (pointing out that parties agree to same standard of review as is used to review "findings of fact and conclusions of law by a Colorado District Court").

188. Society has grown increasingly suspicious of arbitration as a means for resolving disputes, at least under certain circumstances. Mandatory binding arbitration, particularly of statutory claims, has caused increasing controversy. Much attention has been focused on whether the existing arbitral procedure provide sufficient procedural safeguards to ensure that parties will be able to vindicate their statutory rights effectively. *See, e.g.*, Commission on the Future of Worker-Management Relations, Report and Recommendations, 105 Daily Lab. Rep. (BNA) D-34 (June 3, 1994); EEOC Policy Statement on Mandatory Arbitration of Employment Discrimination Disputes as a Condition of Employment, No. 915.002, 133 Daily Lab. Rep. (BNA) E-4 (July 10, 1997). Self-regulatory organizations like the NASD and NYSE responded to criticisms of their mandatory arbitration systems by amending their rules to eliminate the requirement that "associated persons" trading on their exchanges had to agree to arbitrate all statutory disputes arising out of their employment. *See ADR Report* (Sept. 16, 1998). Of course, employers in the securities industry may still require their employees to agree to arbitrate

that merchants no longer have simple commercial disputes that can be decided by an arbitrator who is primarily an expert in industry customs.[189] Today, merchants may have purely commercial, or purely legal disputes, or a combination of both. If legal questions are at issue, merchants might want to expand judicial review since arbitrators are generally considered experts in particular industries but not in the law. In other words, merchants might want to increase the predictability of results where legal issues are pending while still taking advantage of some of arbitration's benefits, such as speed and efficiency.

Yet under the current system of review articulated in FAA § 10(a), parties do not have the power to cabin arbitrator discretion in any meaningful way. Under section 10(a), a court may reverse an arbitral award only under very limited circumstances.[190] Limited review was initially perceived as a benefit of the arbitral process, enhancing the efficiency of decision-making as well as insuring that the arbitrator, often an expert in the subject matter of the dispute,

---

statutory claims as a condition of employment. *See id.* Bills have also been introduced in Congress to ensure that pre-dispute arbitration agreements of employment discrimination claims would no longer be permissible. *See* Civil Rights Procedures Protection Act of 1997, S. 63, H.R. 983, 105th Cong. (1997).

189. *See* David Rudenstine, *The Impact on the Arbitration Process of Arbitrating Statutory Claims, in* CONTEMPORARY ISSUES IN LABOR AND EMPLOYMENT LAW: PROCEEDINGS OF NEW YORK UNIVERSITY 46TH ANNUAL NATIONAL CONFERENCE ON LABOR 260 (Bruce Stein ed., 1993) (stating that as the kinds of issues submitted to arbitrators become more complex, parties' arbitrator selection process may be affected because knowledge of industry norms will no longer be sufficient to justify selection of an arbitrator).

190. 9 U.S.C. § 10(a) lists four bases upon which a party may challenge an arbitral award:

> (1) Where the award was procured by corruption, fraud, or undue means; (2) Where there was evident partiality or corruption in the arbitrators, or either of them; (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a) (1994).

In addition to the four statutory grounds set out in section 10(a), many of the federal appeals courts permit challenge to an arbitral award based on or more of the following grounds: manifest disregard of the law by the arbitrator, the award is arbitrary and capricious, the award violates a clear public policy; the award fails to draw its essence from the parties' contract, and the award is completely irrational. *See* Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 450-51 (1998) (citing cases).

was able to render a final decision that would not be disturbed by a judge who is ignorant of the customs in the industry.[191] Today, arbitrators often are not considered experts in the subject matter of the dispute they arbitrate because many disputes involve statutory and legal claims rather than claims that can be resolved by examining industry customs.[192] Moreover, concerns about arbitrator bias have developed as the subject matter of the disputes submitted to arbitration have changed.[193] In addition, parties to modern arbitration often have widely disparate levels of experience with the arbitral process. An institutional party, who chooses arbitration to resolve all its disputes, may have an advantage over the party who may utilize the arbitral process only once, and only because his contract with the institutional party requires him to do so.[194] In this situation, the institutional party may develop informal relationships with the arbitrator, creating an incentive for the arbitrator to find in its favor. The "one-shot" party will not have an opportunity to develop similar relations. Thus, realistic concerns about arbitrator bias arise.[195] Moreover, one-shot players, unlike repeat players, care about errors even if those errors are unbiased. Because they will not participate in arbitration multiple times, error costs will not even out over time. Thus, if a one-shot player is risk averse, it will prefer to

191. Viewed this way, the reluctance of judges to revisit arbitral decisions is not unlike the deference awarded to corporate directors under the business judgment rule. *See* LEWIS D. SOLOMON ET AL., CORPORATIONS LAW AND POLICY: MATERIALS AND PROBLEMS 40 (4th ed. 1998). The common notion underlying each is that a judge should hesitate to substitute his judgment for that of a person more qualified either by expertise or by the fact that the parties chose the alternate decision-maker. Similar notions underlie the *Chevron* doctrine in administrative law, which cautions against judicial intervention into agency decisions about statutory meaning. *See* Chevron U.S.A., Inc. v. National Resource Defense Council, 467 U.S. 837, 865-66 (1984).

192. *See A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, 91 Daily Lab. Rep. (BNA) A-8, E-11 (May 11, 1995).

193. *See* Hugh R. Combs & Jeffrey W. Sarles, *Courts Examine Whether Judicial Review of Arbitration Awards Can Be Expanded by Contract*, NAT'L L.J. (Aug. 19, 1996), at B5 (stating that in securities and franchise cases, customers or franchisees may question the impartiality of the industry arbitrators); *EEOC Policy Statement on Mandatory Arbitration*, 133 Daily Lab. Rep. (BNA) E-4 (July 10, 1997).

194. An individual who has few opportunities to negotiate agreements or litigate claims is a "one-shot" player. Unlike the repeat player, the one-shot player is characterized by a lack of organization and sophistication about negotiating contracts or engaging in private dispute resolution. *See* Cole, *supra* note 152, at 452.

195. *See EEOC Policy Statement on Mandatory Arbitration*, 133 Daily Lab. Rep. (BNA) E-4 (July 10, 1997) (stating that mandatory arbitration systems are inherently biased against discrimination plaintiffs because the employer obtains a structural advantage as a repeat player against the plaintiff, who is a one-shot player).

avoid the uncertainty inherent in arbitration and prefer a regime that allows more invasive judicial review.

As a result, many parties now believe that the limited review outlined in FAA § 10(a) creates a risk of arbitrary and capricious, or even biased, decision-making. Groups interested in reform of the arbitral process often advocate the requirements of written opinions and expanded judicial review of those opinions as a means to achieve the fairness they believe is currently missing from the process.[196] This concern, together with the expansion in the kind of disputes that may be submitted to arbitration, may have caused an increase in parties' desires for more predictability in outcomes that can be achieved by more expansive judicial review.

Still another possibility exists. As commercial transactions grow in size and amount, the disputes that arise from those transactions similarly increase in magnitude. Under the single tier system of traditional arbitration, parties were not concerned about any single result since results would even out over time (i.e., parties were risk-neutral).[197] As the stakes in a given case become higher, however, merchants who might be risk neutral with respect to small disputes, may become risk averse and want more predictable results. Thus, the parties' desire to expand judicial review may simply be seen as a way to constrain the uncertainty inherent in a single tier or limited multi-tier system.

Although there may be good reasons underlying parties' desires to expand judicial review, such agreements are controversial because they demand greater judicial oversight than Congress has currently provided. Two questions must be answered in order to determine the viability of parties' agreements to expand judicial review of arbitral awards. First, does the Federal Arbitration Act permit parties to contract for expanded judicial review of arbitral awards? Second, if so, to what extent do alterations of the standard of review threaten the courts's institutional integrity?[198]

196. *See* Cole, *supra* note 152, at 447; *see also A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, *supra* note 192.

197. This conclusion assumes unbiased errors in the decision-making process. So long as arbitral errors are unbiased, parties have no cause for alarm over any single decision. *See* Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 922-23 (1979).

198. Not all arbitration awards are reviewed by federal courts. Where the transaction does not involve interstate commerce and/or the parties cannot establish an independent basis for federal jurisdiction, a state court will apply its own law to review an arbitral award. Most states (35) apply the Uniform Arbitration Act to review arbitration awards.

The courts have initially attempted to answer at least the first of these questions as they have addressed whether parties may contract for expanded judicial review of arbitral awards. Unfortunately, an examination of the judicial analysis of the problem fails to yield a unified, well-reasoned solution to the problem at hand.

B. Judicial Analysis of Parties' Ability to Obtain Enforcement of Contracts For Expanded Judicial Review of Arbitral Awards

Three different approaches emerge from the case law analyzing parties' ability to contract for expanded judicial review of arbitral awards. Most courts have concluded that parties can agree to expanded federal court review of an arbitration award.[199] At least one court, the Seventh Circuit, rejected this conclusion, ruling instead that parties cannot obtain greater federal court review than FAA § 10(a) provides.[200] A third approach would allow parties to contract for expanded judicial review as long as the standard of review they select is one that is familiar to the courts. [201]

The Seventh Circuit approach, exemplified by *Chicago Typographical Union v. Chicago Sun-Times, Inc.*,[202] takes a very strict

See STEPHEN K. HUBER & WENDY TRACHTE-HUBER, ARBITRATION: CASES AND MATERIALS 260 (1998). The existing review provisions of UAA § 12(a)(1)-(5) are virtually identical to those in FAA § 10. Thus, answering the questions whether parties can contract for expanded judicial review of arbitral awards in federal courts is also instructive on the question of whether parties in a state court proceeding may agree to expand judicial review of their arbitral award beyond the limits imposed by the UAA. The UAA is currently under revision. Although the proposed Revised UAA initially authorized parties to contract in their arbitration agreement for "judicial review of errors of law in the arbitration award," the most recent draft deletes the provision on the ground that its inclusion is too controversial. *See* Justin Kelly, *Contract Review of Awards Provision Dropped from Latest Draft of UAA*, (Feb. 3, 2000), *available at* <http://www.adrworld.com>.

199. *See* LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997); Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993 (5th Cir. 1995); Syncor Int'l Corp. v. McLeland, 120 F.3d 262 (4th Cir. 1997).

200. More recently, the Eighth Circuit, in dicta, expressed reservations about the ability of parties to contract to expand judicial review. *See* UHC Management Co., Inc. v. Computer Sciences Corp., 148 F.3d 992, 997 (8th Cir. 1998). Recognizing that there is a difference between contracting for arbitral procedures and contracting for an Article III court to review an arbitral decision, the court identified the issue as an "interesting question" whose resolution was unnecessary at the present time. *Id.* at 998.

201. *See Kyocera*, 130 F.3d at 887-88. Judge Kozinski has stated that deciding whether parties could contract for an "errors of law" provision in their arbitration agreement was one of the more difficult questions he has encountered recently, and one which deserved more scholarly attention. *See* Judge Alex Kozinski, Remarks at the 1998 AALS Annual Meeting: Can/Should/Does Legal Scholarship Influence the Legal System (Jan. 9, 1998).

202. 935 F.2d 1501 (7th Cir. 1991).

view of federal jurisdiction. Rejecting a union's suggestion that the court should set aside the arbitrator's award if it was an "unreasonable interpretation of the contract,"[203] the Seventh Circuit held that the federal court did not have jurisdiction to review cases beyond the strictures outlined in FAA § 10(a). The court distinguished between parties contracting for an appellate arbitration panel to review the arbitrator's decision and an attempt to obtain greater review in the federal courts than the FAA provides. According to the court, while parties are free to contract for all the private justice they might desire, they cannot contract for judicial review of arbitral awards. In other words, the court stated, "federal jurisdiction cannot be created by contract."[204]

The flaw in this analysis is that it confuses jurisdictional limitations with restrictions on the court's power to render decisions. The Federal Arbitration Act does not create an independent basis for federal jurisdiction.[205] In order to challenge an arbitral award, then, a party must first establish either federal question or diversity jurisdiction.[206] Thus, in *Chicago Typograhpical Union*, as in any other case involving a challenge to an arbitral award, the question is not whether the parties have created federal jurisdiction, but rather whether the court has the power to grant review on bases other than those identified in the FAA. In other words, the only question is whether the substantive law governing the court's action, here the FAA, allows the court to grant the parties' request. If the substantive law permits the court to grant the parties' request, the court should grant the request, absent any institutional integrity concerns.[207]

The second approach takes a much broader view of federal jurisdiction. Courts following this approach allow parties to contract for whatever standard of judicial review they desire. In these cases,

203. *Id.* at 1507. The case is strange in that the parties do not appear to have contracted to expand judicial review beyond the FAA's limited provisions. Instead, it appears that the union was suggesting that the Seventh Circuit engage in a more expanded review of the arbitrator's decision, one that would consider whether the arbitration award was based on an "unreasonable interpretation of the contract." *Id.*

204. *Id.* at 1504.

205. The FAA is an anomaly in the field of federal jurisdiction because it does not create any independent federal question jurisdiction under 28 U.S.C. § 1331 or otherwise. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983). In order to challenge an arbitral award, then, the moving party must establish a basis for federal jurisdiction outside of the FAA. Thus, any case in which a party is appearing in federal court on a matter concerning arbitration is a case that could have been brought in federal court if no arbitration agreement existed.

206. *See id.*

207. *See supra* notes 28, 31, and 111.

courts acknowledge no limitations on the parties' ability to ask for, or the court's ability to grant, different standards of review than those listed in the FAA. For example, in the Fifth Circuit case, *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*,[208] the parties contracted for federal court review of any arbitral decisions rendered in disputes between them on the basis of "errors of law."[209] The Fifth Circuit held that the parties could agree by contract to expand federal judicial review of their arbitration award.[210] The *Gateway* court emphasized that the FAA's judicial review provision was a default rule that parties could contractually avoid.[211] Because the court viewed FAA § 10(a) as providing default rules that could be altered by contract, it did not consider whether contracting for expanded judicial review caused any jurisdictional problems for the federal court required to conduct the review.

Like the parties in *Gateway*, the parties in *Kyocera* contracted for judicial review of arbitral decisions on the basis of errors of law.[212] The *Kyocera* court acknowledged that where parties are silent, the reviewing court is limited to evaluating the award to determine if it falls within one of the grounds set forth in FAA §10(a) or one of the common law exceptions, such as "manifest disregard of the law."[213] Where parties do specify different grounds for judicial review other than those listed in section 10(a), however, the court held that "we must honor that agreement."[214] In support of this conclusion, the court relied both on its interpretation of the FAA's statutory purpose and on recent Supreme Court decisions adopting a contractualist view of arbitration, particularly *Volt Info. Sciences v. Board of Trustees of Leland Stanford Jr. University*.[215]

208. 64 F.3d 993 (5th Cir. 1995).

209. *See id.* at 996.

210. Ignoring the parties' agreement, the district court had reviewed the arbitral award using a "harmless error" standard rather than the "errors of law" standard the parties selected. In addition to holding that the parties could choose their own standard of review, the court also held that the court should apply the standard of review the parties selected. *See id.*

211. *See id.* at 996-97.

212. The *Kyocera* agreement provided in full that: "[t]he Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrators' findings of fact are not supported by substantial evidence, or (iii) where the arbitrators' conclusions of law are erroneous." LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 887 (9th Cir. 1997).

213. *Id.* The court did not articulate whether the limitation on greater review is jurisdictional.

214. *Id.* at 888.

215. 489 U.S. 468, 478-79 (1989). In *Volt*, the parties agreed to arbitrate all disputes

According to the *Kyocera* majority, the FAA's purpose is to enforce valid contractual provisions according to their terms.[216] Viewing arbitration in this light, the court held that any rules or procedures the parties agree to should be enforced. Thus, FAA § 10(a) is a default standard of review which the parties can, and here did, supplement by contract.[217] The Court emphasized that this result was consistent with the strong federal policy in favor of enforcing private arbitration agreements in accordance with their terms as articulated in recent Supreme Court decisions such as *Volt*.[218]

What this argument ignores is that cases like *Volt* concern the parties' ability to dictate by contract matters relating to the subject matter and procedural rules of the arbitral proceeding, *not* the power of the federal court to review any disputes arising out of such an agreement. In *Volt*, for example, the issue was whether the parties could agree that California law should be applied if a dispute arose under their contract. The Court in *Volt* held that the parties' choice of law provision should be honored even though that meant staying the arbitration until the California court proceeding was concluded. Like other cases before it, the *Volt* Court did not need to address the question whether parties could expand the court's role in the review process because *Volt* involved a question about the enforceability of mutual obligations under a contract and whether an agreement to abide by California law should be preempted by the Federal Arbitration Act.[219] Thus, *Volt* does not support an argument extending federal jurisdiction since it stands merely for the

arising out of their contract and that California law would govern the determination of such disputes. When a dispute arose, the Court honored the parties' choice of law provision even though California law required a stay of arbitration pending the resolution of court proceedings involving third parties not bound by the arbitration agreement. The Court emphasized that the parties' privately negotiated agreements should be enforced just like any contract, in accordance with its terms. *See id.* at 468.

216. *See Kyocera*, 130 F.3d at 889.

217. *Id.*

218. *See id.* at 888 (quoting *Volt*, 489 U.S. at 478-89). In *Volt*, the court held that parties may not only limit by contract the issues to be arbitrated, but also may "specify by contract the rules under which that arbitration will be conducted." *Id.*

219. *Volt* authorizes parties to contract both for the kinds of issues they want to arbitrate and the rules under which the arbitration will be conducted. *See* Collins v. Blue Cross Blue Shield, 916 F. Supp. 638 (E.D. Mich. 1995). This freedom of contract "applies only in the context of the arbitration itself." *Id.* at 641. Although the *Collins* court did enforce the parties' agreement to expand judicial review beyond the FAA, it recognized that *Volt* did not authorize this enforcement. *Id.*

proposition that the contractual agreements of the parties regarding arbitration governance issues should be enforceable.[220]

The *Kyocera* court did give some consideration to the question of whether the parties' alteration of the FAA standard of review actually expands federal court jurisdiction as the *Chicago Typograhical Union* court suggested. The court reasoned that because the federal court could have been required to decide all aspects of the dispute absent an arbitration agreement,[221] it is not an expansion of the federal court's jurisdiction to review an arbitration decision under an agreed standard of review.[222] Because judicial review of the arbitration decision is "a far less searching and time-consuming inquiry than a full trial," the federal court, assuming it has jurisdiction, can provide such review.[223]

Finally, the *Kyocera* court distinguished *Chicago Typographical*'s holding that parties cannot contract for judicial review beyond what the FAA provides on the basis that the Seventh Circuit had simply not given adequate consideration to the question. According to *Kyocera*, because the reasoning underlying the Seventh Circuit's "cryptic assertion" that parties cannot contract to expand federal jurisdiction was not explained, the court's conclusion was likely dicta and, failing that, wrong.[224]

220. The *Volt* Court did state that "it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself." 489 U.S. at 479. Yet this statement is dicta and must be understood in the larger context of the case, which addresses only the agreement of the parties as to how the arbitration should proceed. The Court cautioned that the enforcement of the parties' agreement was appropriate because it effectuated the contractual rights and expectations of the parties "without doing violence to the policies behind the FAA." *Id.* at 479. This article suggests that blind adherence to contract principles would, in part, do violence to the FAA.

221. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983).

222. *See Kyocera*, 130 F.3d at 889 (quoting Fils et Cables d'Acier de Lens v. Midland Metals Corp., 584 F. Supp. 240, 244 (S.D.N.Y. 1984)). The *Midland* court asserted that the FAA does not preclude the parties' agreement to expand the power of the reviewing court because the parties could have brought their case in federal court initially. 584 F. Supp. at 244 (noting that the FAA does not create an independent basis for federal jurisdiction). Finding neither a jurisdictional nor a public policy reason for precluding enforcement of the parties' agreement, the court held that it should be enforced. *See id.* The purported public policy was the desire to encourage efficiency in dispute resolution. The *Midland* court found that this was not undermined by the parties' agreement because arbitration, even with expanded review, was still "a far less searching and time-consuming inquiry than a full trial." *Id.*

223. *Kyocera*, 130 F.3d at 889.

224. *Id.* at 890.

Judge Kozinski's concurrence in *Kyocera*[225] represents the third approach, which considers whether courts have the ability to grant parties' requests for expanded judicial review. In his concurrence, Judge Kozinski articulated his concern that the cases allowing parties to decide how their arbitration should be administered did not naturally support a conclusion that the parties can dictate how the courts should review the decision. Judge Kozinski stated, "I do not believe parties may impose on the federal courts burdens and functions that Congress has withheld."[226] Responding to this concern, he reached the same conclusion as the majority, reasoning that any case where parties agreed to expand judicial review could have been in federal court absent the existence of the arbitration agreement. Thus, Judge Kozinski concluded, "enforcing the arbitration agreement—even with enhanced judicial review—will consume far fewer judicial resources than if the case were given plenary adjudication."[227]

In sum, a review of the existing case law reveals disagreement about the appropriate method for evaluating parties' agreements to

225. *Id.* at 891.

226. *Id.*

227. *Id.* Several state courts have also considered the propriety of allowing parties to contract to expand judicial review of arbitral awards. At least three courts prohibit party enlargement of statutory standards. *See* Dick v. Dick, 534 N.W.2d 185, 191 (Mich. Ct. App. 1995); South Wash. Assocs. v. Flanagan, 859 P.2d 217, 219 (Co. Ct. App. 1992); Chicago Southshore & South Bend R.R. v. Northern Ind. Commuter Transp. Dist., 682 N.E.2d 156, 160 (Ill. App. Ct. 1997). Four other courts permit parties to expand the standard of review. *See* NAB Constr. Corp. v. Metropolitan Transp. Auth., 579 N.Y.S.2d 375, 375 (App. Div. 1992); Moncharsh v. Heily & Blase, 832 P.2d 899, 919 (Cal. 1992); Primerica Fin. Servs. v. Wise, 456 S.E.2d 631, 634 (Ga. Ct. App. 1995); Tretina Printing, Inc. v. Fitzpatrick & Assocs., 640 A.2d 788, 793 (N.J. 1993). Like the federal courts, state courts disagree on this issue. A Michigan appellate court found that because a state statute did not authorize the parties to appeal substantive matters following an arbitration, a clause in the parties' contract authorizing an appeal on the ground that the arbitrator made an "[error] of substance" was not enforceable. *Dick*, 534 N.W.2d at 579. Similarly, in *South Washington Associates* a Colorado appellate court held that parties cannot define by contract the power of a court of law. 859 P.2d at 220. According to the court, the parties' agreement to authorize appellate court review using the same standard as the court would use to review a trial court decision was invalid because the authority to determine jurisdiction of a state appellate court belongs to the legislature rather than the parties. Interpreting the statute granting it jurisdiction, the court rejected the claim that the "award" of a panel of arbitrators fell within the category of "final judgments" which the legislature authorized the court to hear. *Id.* More generally, the court stated, while parties have the freedom to formulate the arbitral process, the power to "define and prescribe the powers of a court of law" belongs to the legislature alone. *Id.*

By contrast, a New York appellate court enforced the parties' agreement to allow judicial review to determine if an arbitral award was arbitrary, capricious, or so grossly erroneous as to evidence bad faith. *See NAB Constr. Corp.*, 579 N.Y.S.2d at 375.

expand judicial review of arbitral awards. The *Gateway* approach represents an extreme freedom of contract approach—contracts should be honored without regard to questions of limitations on jurisdiction. The *Chicago Typographical* approach goes the opposite direction, prohibiting parties from agreeing to any standard of review not identified in the FAA. Kozinski's position suggests a compromise—allow parties to contract for standards of review as long as the court is familiar with them. Since the cases could have been in federal court in the absence of the parties' arbitration agreement, reasons Kozinski, enforcement of familiar standards of review will be efficient and will not violate any important federal jurisdictional principles.

IV. Application of the Proposed Framework to Parties' Requests for Expanded Judicial Review of Arbitral Awards

None of the current judicial analyses of parties' requests for expanded judicial review of arbitral awards are satisfactory. All three approaches are flawed for two reasons. First, the approaches do not consider whether the Federal Arbitration Act limits federal court review of arbitral awards to those bases identified in FAA § 10(a). Second, the approaches are inadequate because they fail to evaluate independently the impact granting particular requests might have on courts' institutional integrity. While Kozinski's approach comes closest to the mark, in that he would reject those requests which would require the court to engage in unfamiliar work, even his approach does not adequately acknowledge the need for a separate inquiry by the courts themselves to determine whether the parties' request would undermine the courts' institutional integrity. Application of the two-step test, developed from careful analysis of judicial treatment of other non-traditional requests for exercises of judicial power, suggests that some limitations on the willingness of courts to grant parties' requests for expanded judicial review of arbitral awards is appropriate.

A. Statutory Authority

The central issue in each of the cases evaluating party requests for expanded judicial review of arbitral awards, not explicitly addressed in any of them, is whether the FAA's limitations on judicial review are mandatory or default rules.[228] In evaluating any novel request for

228. Default rules are those statutory and common law principles that govern party

judicial action, the court must first establish that the court has statutory authority to grant the request. If FAA §10(a) establishes a mandatory rule, the parties' agreement to expand judicial review beyond section 10(a) must be rejected because the court does not have the power to enforce it. If section 10(a) is a default rule, then the court has the authority to enforce the agreement, if it does not otherwise require the court to engage in arbitrary and capricious decision-making. The principal objective of this section is to determine whether the FAA limits the judicial review of arbitral awards to the reasons section 10(a) identifies or whether the FAA simply provides a default rule to govern situations where parties do not request more judicial involvement than the existing statute authorizes.

The presumption should be in favor of achieving the social policy objectives of the FAA with default rules if possible since default rules better preserve the concept of freedom of contract by allowing parties to opt out of them in favor of a regime they prefer.[229] Moreover, unlike a mandatory rule, a default term limits the potential loss that may result to "the lesser of two amounts: (1) the cost to parties of contracting back to their desired rule and (2) the cost to parties living with an undesirable default."[230] If it is determined that the FAA's judicial review provision is a mandatory rule, by contrast, the potential loss that could result is always the latter, which imposes significant costs on parties who would otherwise have negotiated around the rule.

---

behavior unless parties by contract opt out of them. *See* Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 706 (1999). Mandatory rules are legislatively created obligations that parties cannot contract around. *Id.*

229. *See* J. Hoult Verkerke, *An Empirical Perspective on the Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, WIS. L. REV. 837, 869 (1995); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989); Raymond T. Nimmer, *Services Contracts: The Forgotten Sector of Commercial Law*, 26 LOY. L.A. L. REV. 725, 733 (1933). The presumption that default rules are preferable to mandatory rules may be incorrect if there is reason to suspect the validity of parties' choices. In such a situation, a mandatory rule would be preferable to avoid these mistakes. For example, I have argued elsewhere that employees should not be bound to pre-dispute arbitration agreements that they sign as a condition of employment because they have disparate negotiation incentives (when compared to the employer) and because they systematically underestimate the significance of the provision that they sign. *See* Cole, *supra* note 152. In the cases where parties agree to expand judicial review of arbitral awards, there is little reason to suspect the validity of the parties' choices because the parties are both repeat players with significant experience in negotiating such agreements.

230. Verkerke, *supra* note 229, at 869.

Both the *Gateway* and *Kyocera* courts must have concluded that the FAA's rules are default rules rather than mandatory terms because their decisions allow parties to contract around FAA § 10(a). To determine whether section 10(a) is a mandatory rule or a default allocation that parties can contract around is a question that should be answered, if possible, primarily by examining the FAA's language and the congressional intent underlying the drafting of that language.

The standard textualist approach to statutory interpretation assumes that the goal of statutory analysis is to give effect to the expressed intent of Congress.[231] To determine what Congress intended, this analysis traditionally starts and ends with the "plain language of the statute."[232] Difficulties arise when the statutory language is broad enough to encompass the subject matter of the interpretive question but the statutory language fails to address it. In that situation, courts tend to examine not only the statutory language, but its context and the statute's structure as well.[233] If that examination fails to provide sufficient illumination, resort is often made to legislative history.[234] While Congress has not endorsed this method of analysis as a means for elucidating statutory meaning, the idea that the analysis should focus on the statute's text, context and structure is currently in vogue as it reduces the extent to which judges, using their discretion, become the real "authors of the rule."[235]

Examining the plain language of the FAA does not explicitly answer the question of whether the limited review outlined in section

231. *See* Keene Corp. v. United States, 508 U.S. 200, 212-13 (1993); Central Bank v. First Interstate Bank, 511 U.S. 164, 185 (1994); Sanchez v. Pacific Powder Co., 147 F.3d 1097, 1099 (9th Cir. 1988) (stating that "[w]hen interpreting a statute, this court looks first to the words Congress used"); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407, 415-16 (1989) (writing that textualism, which looks to the statutory language as the source of judicial power, is "enjoying a renaissance in a number of recent cases"); Sarah Rudolph Cole, *Continuation Coverage Under COBRA: A Study in Statutory Interpretation*, 22 J. LEGIS. 195, 210 (1996) (citing a variety of commentators, including Hart and Sacks, stating that the starting point for the court in matters of statutory interpretation is to give effect to congressional intent). Textualism is not the only approach to statutory interpretation. *See* Sunstein, *supra*, at 415-41. Because it receives a certain general acceptance among academics and courts, it will be applied to the FAA language.

232. Bennet v. Spear, 520 U.S. 154, 173 (1997) (the "cardinal principle of statutory construction" requires a court to give effect "to every clause and word of a statute"); Brogan v. United States, 118 S. Ct. 805 (1998); Lutheran Hosp. v. Businessmen's Assurance Co. of Am., 51 F.3d 1308, 1312 (7th Cir. 1995).

233. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990). *See also* Herrmann v. Cencom Cable Assocs., Inc., 978 F.2d 978, 983 (7th Cir. 1992).

234. *See* Cole, *supra* note 231, at 210; Garcia v. Garcia, 469 U.S. 70, 75 (1985).

235. *Herrmann*, 978 F.2d at 436.

10(a) represents a mandatory limit or merely a default rule. At first glance, section 10(a) would appear to give a federal court the power to vacate an award only when the arbitrator's actions jeopardize the procedural fairness of the arbitration.[236] Yet the section does not require the court to vacate the award even when these bases appear. According to section 10(a), in any of the following "cases," i.e., where procedural irregularity has occurred, a federal court "may make an order vacating the award upon the application of any party." The use of the word "may" suggests that the court's action is not mandatory.

While section 10(a) is not particularly clear on this issue, FAA § 9 contains language supporting the argument that the statutory grounds articulated in section 10(a) are exclusive. According to section 9: "[t]he court must grant such an order [confirming the award] unless the award is vacated, modified, or corrected as prescribed by sections 10 and 11 of this Title." At least one federal appellate court interpreted this language to mean that Congress did not want federal courts to conduct a de novo review of arbitral awards on their merits; rather, it "commanded that when the exceptions do not apply, a federal court has no choice but to confirm."[237]

The identification of only four bases for vacatur in the FAA, all of which allow vacation only where procedural irregularities appear, also suggests that the drafters of the FAA were concerned exclusively with ensuring the procedural regularity of the arbitral decision-making process, rather than guaranteeing that the arbitral decision is correct on the merits. While the statutory criteria outlined in Section 10(a) appear to focus primarily on preventing inappropriate arbitrator conduct rather than on ensuring that the underlying decision is correct, courts and commentators have offered broader readings of Section 10(a).

236. *See* Federal Arbitration Act, 9 U.S.C. § 10(a) (1992). Thomas Carbonneau contends that FAA § 10 does not contemplate review of arbitral awards on the merits. "[I]n fact," he states, "such a practice contradicts the gravamen of the legislation and the judicial policy that sprang from it." THOMAS CARBONNEAU, CASES AND MATERIALS ON COMMERCIAL ARBITRATION 260 (1997).

237. UHC Management Co. v. Computer Sciences Corp., 148 F.3d 992, 997 (8th Cir. 1998) The *UHC* court concluded that, in light of the FAA's language, it is not clear that the *Kyocera* decision was correct. The court stated: "We do not believe it is a foregone conclusion that parties may effectively agree to compel a federal court to cast aside sections 9, 10, and 11 of the FAA." *Id.* The *UHC* court did not have to rule on the issue, however, because the parties had not clearly stated that they wanted to depart from the statutory review standard. *Id.*

For example, at least one commentator has argued that section 10(a)(4) contemplates significant judicial oversight of the arbitration award.[238] According to Professor Stephen Ware, section 10(a)(4), which permits reversal of arbitral awards because the arbitrator exceeded his authority, necessarily includes the ability to reverse such awards where the arbitrator did not apply the correct law.[239] In other words, section 10(a)(4) authorizes reversal of an arbitral award when an error of law is made. Courts have not extended section 10(a)(4) that far; at the present time, it has only been applied to cases where the arbitrator has decided an issue not properly before her or where she directed a remedy that was not within her power to order. Thus, to this point, section 10(a)(4) has only peripherally applied to the merits of the underlying case.[240]

Professors Edward Brunet and Charles Craver have argued that the language in FAA § 10(a)(3) contemplates a merit-based review of arbitral awards.[241] According to Brunet and Craver, section 10(a)(3) allows reversal of an arbitrator's award when the arbitrator's misbehavior prejudices the "rights" of any party. The use of the term rights "must mean that the drafters intended that courts should have some ability to set aside awards because of denials of 'rights.'"[242] Rights in this context would include the ability to have the award reversed where a misinterpretation of the law by the arbitrator resulted in a denial of rights. Thus, the Brunet-Craver reading of section 10(a)(3) would allow the court to reverse an arbitral award for an error of law that resulted in a denial of rights. While courts have never read section 10(a)(3) this broadly, it certainly raises the question whether the provision should be more broadly construed.

Although the language of section 10(a), when read in the context provided by section 9 would seem to establish that the FAA provided the exhaustive list of reasons for reversal of an arbitral award, it is difficult to conclude confidently that this is the case. The analysis of the section suggests three possible outcomes: (1) that Congress intended to allow federal courts great freedom in deciding whether and when to vacate an arbitral award; (2) that Congress wanted to limit the bases for vacation to those listed in section 10(a); or (3)

238. *See* Ware, *supra* note 228, at 737.

239. *See id.*

240. *See id.* While this is a much broader reading of the section than the courts have suggested is appropriate, it raises the question whether section 10(a)(4) is subject to more than one construction.

241. *See* BRUNET & CRAVER, *supra* note 156, at 411-12.

242. *Id.*

Congress did not contemplate parties requesting greater judicial review than section 10(a) provides. For the reasons following, the most likely explanation is the third one.

Section 10(a) is not a significant departure from common law or state statutory arbitration as it existed prior to the FAA's passage.[243] According to Professor MacNeil, the adoption of section 10 was, for practical reasons, an unnecessary step as the existing common law already limited the bases upon which a court could vacate an arbitral award.[244] In fact, the 1921 draft of the FAA did not include any provisions governing judicial review of arbitral awards.[245] This is not surprising since the 1921 draft mirrored the 1920 New York arbitration law, which also failed to include any provisions dealing with the process for reviewing awards.[246]

Thus, it would seem likely that the drafters of the FAA were simply attempting to codify what they perceived to be the existing consensus regarding judicial review of arbitral awards—that review should be limited to reversal on the grounds of procedural irregularity. It is quite probable that the drafters simply did not contemplate that parties would ever be interested in expanding judicial review of arbitration awards. Nothing in the legislative history jeopardizes this assumption. In fact, the legislative history focuses almost entirely on the critical issue that the FAA was passed to address: the enforceability of pre-dispute arbitration agreements.[247] The Supreme Court's examination of the FAA's legislative history supports the notion that Congress passed the FAA primarily in order to ensure that parties' pre-dispute agreements to arbitrate would be enforced.[248] The absence of discussion of judicial review in the legislative history suggests that the drafters intended to codify the common law, which limited review to examination of the arbitral award for procedural irregularities.

Because the language of the FAA and its legislative history is somewhat inconclusive on the issue of expanding statutory grounds

243. *See* MACNEIL, *supra* note 176, at 104. Although American courts and legislatures' treatment of arbitral awards was not consistent, for the most part, courts and legislatures provided only limited judicial review of arbitral awards even where the arbitrator had ruled on issues of law.

244. *See id.*

245. *See id.* at 86.

246. *See id.*

247. *See id.*

248. *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985) (holding an agreement to arbitrate enforceable even when pleaded together with nonarbitrable claims in a complaint).

for vacatur beyond the reasons articulated in section 10(a), examination of the judicial treatment of the four bases for vacatur listed in section 10(a) may help to eliminate the ambiguity.

Some courts of appeal have held that the section 10(a) establishes the exclusive grounds for vacating commercial arbitration awards.[249] Yet most other court of appeals have vacated arbitral awards on grounds not articulated in section 10(a).[250] According to the latter courts, the acceptable nonstatutory grounds for vacatur include that the award was: in manifest disregard of the law, completely irrational, in direct conflict with public policy, arbitrary and capricious or failed to draw its essence from the parties' underlying contract.[251]

Courts have accepted the "manifest disregard of the law" standard for vacatur more frequently than the other nonstatutory grounds for vacatur of arbitral awards.[252] This basis for appealing an

249. *See* R.M. Perez & Assocs., Inc. v. Welch, 960 F.2d 534, 539-40 (5th Cir. 1992); O.R. Sec., Inc. v. Professional Planning Assocs., Inc., 857 F.2d 742, 746 (11th Cir. 1988). For additional cases, see Brad A. Galbraith, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 IND. L. REV. 241, 248 (1993).

250. Prudential-Bache Sec., Inc. v. Tanner, 72 F.3d 234, 239 (1st Cir. 1995); Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997). *But see*, McIlroy v. PaineWebber, Inc., 989 F.2d 817, 820 n.2 (5th Cir. 1993) (rejecting any non-statutory grounds for vacating arbitration awards).

251. Five federal courts of appeals—the Second, Third, Tenth, Eleventh, and D.C. Circuits—have recognized one or more of these nonstatutory grounds for vacatur. *See* Hayford, *supra* note 190, at 463. Five other federal courts of appeals—the Fifth, Sixth, Seventh, Eighth, and Ninth Circuits—however, have stated their positions much less clearly. At times, cases from the circuits indicate a desire to limit review to the statutory grounds, asserting that section 10(a) establishes the "exclusive grounds" for vacating arbitration awards; at other times, as Professor Hayford notes, each of these courts has issued decisions granting vacatur on one of the non-statutory vacatur grounds. *Id.* at 463-64.

252. *Id.* at 465. Only the Fourth Circuit has consistently rejected parties' attempts to avoid arbitral awards on nonstatutory grounds. Remmey v. Painewebber, Inc., 32 F.3d 143 (4th Cir. 1994). When Congress enacted the FAA, the court stated, it intended to limit the grounds for vacatur to the four listed in section 10(a) of the FAA. *Id.* According to the *Remmey* court, "[t]he statutory grounds for vacatur permit challenges on sufficiently improper conduct in the course of the proceedings; they do not permit rejection of an arbitral award based on disagreement with the particular result the arbitrators reached." *Id.* Both the Eighth and Eleventh Circuits have declined to adopt the "manifest disregard" standard, although they have not expressly rejected it. Ainsworth v. Skurnick, 960 F.2d 939, 940-41 (11th Cir. 1992) (per curiam); Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 750 (8th Cir. 1986). Three circuits have criticized the standard. Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704 (7th Cir. 1994); Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1412-13 (11th Cir. 1990); I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 430-31 (2d Cir. 1974).

arbitral award emerged from the dictum of a 1953 Supreme Court decision, *Wilko v. Swan*.[253] In *Wilko*, the Court said that

> [w]hile it may be true . . . that a failure of the arbitrators to decide in accordance with the provisions of the [applicable law] would "constitute grounds for vacating the award pursuant to section 10[(a)] of the Federal Arbitration Act," that failure would need to be made clearly to appear. In unrestricted submission [to arbitration] . . . the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.[254]

Many appellate courts have construed *Wilko* as adding a nonstatutory ground to the already existing grounds for vacatur listed in section 10(a). This position is controversial for several reasons. First, it is not clear that the *Wilko* Court intended to add a "nonstatutory" ground to the existing grounds for vacatur. The Court stated that the arbitrator's manifest disregard of existing law constitutes "grounds for vacating the award *pursuant to section 10 of the Federal Arbitration Act*."[255] It would seem that the Court was merely interpreting the statutory grounds listed in section 10(a) to include cases where an arbitrator manifestly disregarded the law—in other words, she knew what the law was and ignored it. Certainly, section 10(a)(4), allowing vacatur where the arbitrator exceeds his powers could fit within its purview situations where the arbitrator ignores existing law.[256] Other federal courts have adopted this interpretation of *Wilko*, holding that the "manifest disregard" standard is derived from, rather than independent of, section 10(a).[257]

Moreover, it is questionable whether the dictum establishing the "manifest disregard" standard is still good law. At the time *Wilko v. Swan* was decided, the Court was extremely suspicious of arbitration as a means to resolve statutory claims. That suspicion has long since been abandoned and *Wilko* overruled on the ground that statutory

253. Wilko v. Swan, 346 U.S. 427 (1953), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

254. *Id.* at 436-37 (quoting Wilko v. Swan, 201 F.2d 439, 445 (2d Cir. 1953)) (citations omitted).

255. *Id.* (quoting *Wilko*, 201 F.2d at 445) (emphasis added).

256. Although the Court has mentioned the manifest disregard standard in three other opinions, it has never clarified the relationship between the "manifest disregard" standard and Section 10. Thus, it is open to interpretation as to the meaning underlying the Court's dictum in *Wilko*. Other commentators raise the issue whether the *Wilko* dictum may have been intended merely to "illustrate an instance which would fall within the scope of the Federal Arbitration Act's provisions for vacating an arbitration award," rather than creating an independent statutory ground for vacatur. Galbraith, *supra* note 249, at 257.

257. *See* Jenkins v. Prudential-Bache Sec., Inc., 847 F.2d 631, 634 (10th Cir. 1988); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986).

claims are appropriate subjects of arbitration. In light of the changed judicial attitude toward arbitration, one wonders whether the Supreme Court's 1953 position that awards could be overturned for manifest disregard of the law would still be the Court's view today.[258]

Similar difficulties are apparent when the other nonstatutory grounds are examined. The remaining nonstatutory grounds are inconsistent with the plain language of section 10(a) of the FAA because they contemplate a substantive review of the underlying arbitral award. Moreover, the Supreme Court has not recognized any of these nonstatutory grounds as additional bases for vacating arbitral awards. Finally, unlike the "manifest disregard" standard, none of the remaining nonstatutory grounds have reached any level of acceptance among the federal appellate courts. In light of this lack of consensus and inconsistency with FAA intent, the remaining nonstatutory grounds do little to undermine the argument that the FAA's standards for judicial review are mandatory rules.

An examination of the FAA's statutory language, its legislative history and subsequent judicial interpretation of its language does not clearly indicate that the FAA's review provisions are either mandatory or default rules. As courts and commentators have repeatedly suggested, section 10(a)'s language is susceptible of more than one interpretation. An interpretation that would permit courts to grant parties' requests for greater review of arbitral awards would be consistent with a permissible interpretation of the language of section 10(a) and the purpose underlying the FAA. Although the opposite conclusion is also an acceptable interpretation, given the importance of freedom of contract and the presumption in favor of finding that the FAA creates default rules rather than mandatory ones, a conclusion that the FAA authorizes courts to grant party requests would seem the better result.

B. When do Parties' Requests for Expanded Judicial Review of Arbitral Awards Threaten Institutional Integrity?

Assuming courts have the authority to enforce agreements to expand judicial review of arbitral awards, the next question is whether such agreements threaten the institutional integrity of the court.

258. *See* Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 706 (7th Cir. 1994) ("[The *Wilko*] formula reflects precisely that mistrust of arbitration for which the Court in its two Shearson/American opinions criticized *Wilko*. We can understand neither the need for the formula nor the role that it plays in judicial review of arbitration [awards] (we suspect none-that it is just words). If it is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration.").

Typically, parties have asked courts to review arbitral awards utilizing standards such as "errors of law." Using notions of party autonomy, courts have quickly approved the use of this standard and others, applying to them to review arbitral awards. In so doing, the courts evaluating these requests have virtually ignored the threat the use of such standards pose to institutional integrity.[259] Systematic application of an institutional integrity standard to parties' requests would force courts to evaluate carefully whether adoption of the parties' proposed standard for reviewing the arbitral award undermined the court's integrity. Using an integrity review, a court could easily reject a proposed standard that would require the court to review the underlying arbitral award by flipping a coin or studying the entrails of a dead fowl. Moreover, application of such a standard would ensure that courts evaluate properly requests that might appear, at first glance, not to threaten the court's integrity.

In the arbitral context, for instance, courts have routinely upheld parties' request for application of the "errors of law" standard. While this standard might not appear to threaten the court's integrity because courts review all kinds of decisions for legal errors, it is nevertheless problematic because it asks the court to review the underlying award even in the absence of a record or written opinion from the proceedings before the arbitrator.[260] A court's rubber-stamp of the underlying decision in the absence of a record when the parties' chosen standard anticipates a more meaningful review may undermine institutional integrity because it makes the court appear to be an unprincipled decision-maker.

When such a case presents itself, how might a court go about engaging in an integrity review? Analogies to consent decrees,

259. While the majority opinions in these cases reflect little concern for the court's integrity, Judge Kozinski's concurrence in *Kyocera* suggests that, for him, concerns about the court's integrity are relevant to the discussion. Lapine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring). Kozinski's comment that his decision might be different if the parties had asked the court to "review the award by flipping a coin or studying the entrails of a dead fowl," shows a recognition that freedom of contract must yield in those cases where the integrity of the courts as an institution is threatened. *See id.*

260. In modern arbitration, it is unusual for parties to maintain a record of their arbitral hearing or for an arbitrator to write an opinion. Thus, when the parties request judicial review of the arbitral award, there is little for a court to review. When a court reviewed arbitral awards for procedural irregularities alone, the lack of a record or opinion was not viewed as problematic. As Stephen Hayford notes, commercial arbitrators rarely set forth the reasons underlying their decisions in a written opinion. *See* Hayford, *supra* note 190, at 444-45. Nevertheless, courts have routinely applied the FAA's four bases for vacatur. *See id.* at 452-53.

summary jury trials, requests for magistrates and requests for vacatur are not especially helpful in this context because they involve an integrity review of the parties' request to facilitate settlement using non-traditional means, not an application of a standard of review to a decision. Perhaps an analogy to administrative law would be more helpful because courts routinely review administrative agencies' informal adjudications.[261] Like arbitrations, informal agency adjudications resolve disputes between two parties. When a court reviews an informal agency decision, it considers whether the agency's decision was arbitrary or capricious. A decision is rejected as arbitrary and capricious if the agency offered an explanation for its decision that contradicts the evidence that was before the agency at the time of the decision, or failed to supply a reasoned analysis supporting its decision.[262] In other words, application of an arbitrary and capricious standard performs the function of assuring sufficient factual support for a decision.[263] By applying the arbitrary and capricious rule, courts attempt to strike a balance between excessive judicial intervention in agency decision-making, on the one hand, and abdication of traditional control over judicial power on the other.[264]

As in administrative law, application of an arbitrary and capricious standard to evaluate party requests for expanded judicial review of arbitral awards requires a court to ensure that it is capable of reviewing the underlying decision using the standard the parties propose. If a court is unable to apply the parties' standard because there is no record to which it may apply the standard, the court would reject the standard as requiring the court to engage in arbitrary and capricious decision-making and dismiss the parties' case.[265]

261. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (stating that agency decisions are reviewed under an arbitrary and capricious standard); Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1973) (holding that in the absence of reasoned analysis, change in agency policy is rejected as arbitrary and capricious).

262. *See Motor Vehicle Mfrs. Assoc.*, 463 U.S. at 29. In the agency context, the court will also consider whether the agency has relied on factors which Congress did not intend it to consider or failed to consider factors that it should have considered. *See id.*

263. *See* Association of Data Processing Serv. Orgs., Inc. v. Board of Governors of the Fed. Reserve Sys., 745 F.2d 677, 683 (D.C. Cir. 1984).

264. *See* Morse v. Stanley, 732 F.2d 1139, 1145 (2d Cir. 1984) (stating that the application of the arbitrary and capricious rule to ERISA disputes strikes the appropriate balance between the need for judicial control of fiduciaries' actions with the need to avoid excessive judicial intervention in the discharge of trustees' discretionary duties).

265. In reviewing arbitral awards based on a standard the parties' propose, courts would utilize the arbitrary and capricious standard somewhat differently than would courts reviewing agency decisions. Rather than ensuring that the *agency* has not acted

Of course, adoption of "arbitrary and capricious" as the standard for reviewing parties' requests is not a panacea. Unlike administrative law, where the administrative agency is a party to the proceeding in front of the district court and is therefore subject to the court's orders, in arbitration, the court cannot order the arbitrator to do anything because the arbitrator is not a party to the enforcement action, only the parties to the arbitration are. Because the court has no power to order the arbitrator to do anything, the court has no power to remand the case to the arbitrator for development of a record or drafting of an opinion.

The answer, then, is for the court to reject the parties' request for expanded judicial review on the basis that it requires arbitrary and capricious action by the court, which would undermine the court's institutional integrity. Then the parties, if they so choose, can commission the arbitrator to write an opinion or, in their next agreement, agree to maintain a record of the arbitral proceedings.[266] Failure to include such a provision would result in application of the default rules outlined in section 10(a) of the FAA.

C. Allowing Expanded Review of Arbitral Awards May Not Conserve Judicial Resources

While the proposed test does not require consideration of resources issues, an analysis of that question in the arbitral context supports the notion that such an inquiry would be futile. As with summary jury trials and consent decrees, the perception is that expanded judicial review of arbitral awards would conserve judicial resources by encouraging more parties to arbitrate cases that would otherwise have been brought in federal court. It may be true that allowing parties to expand judicial review will create an incentive for parties, previously reluctant to agree to arbitrate, to contract for arbitration. If more parties agree to arbitrate with an expanded review standard, the amount of work courts must do for each arbitrated case may also

arbitrarily and capriciously, in the case of arbitral award review, the court is ensuring that application of the parties' standard does not require the *court* to act arbitrarily and capriciously. Despite this difference, the administrative law analogy seems helpful in that, in both administrative law and elsewhere, the court's concern is to ensure that arbitrary and capricious decision-making is not tolerated.

266. Unlike early state habeas corpus cases where a state trial court's failure to maintain a record did not preclude substantive review, in the arbitral context, there is typically little in the manner of pleadings or discovery to review. Thus, a record or opinion requirement is essential because, without such a requirement, the court would have nothing to which they could apply the parties' proposed standard of review.

increase because appealed cases will be subject to more extensive review. Thus, judicial resources will be conserved only if the savings incurred by decreasing the number of cases in court is not offset by the rise in costs that will result from the increased number of arbitral award review cases a court must hear. One might speculate that parties who insert an expanded judicial review provision into their arbitral agreement are more likely to make use of that provision. If so, the increased costs associated with hearing arbitral award appeals may exceed the savings gained by decreasing the number of court cases through diversion by agreement to arbitration. Of course, the opposite might also be true. In the absence of empirical study, a court would have great difficulty concluding that approving a request for expanded judicial review of arbitral awards would be more cost efficient than rejecting it.

V. Conclusion

Recent court decisions, particularly in the arbitral context, reflect an eagerness to embrace the notion of party autonomy in dispute resolution. In welcoming party requests for non-traditional use of judicial resources, however, the courts have improperly ignored congressionally and constitutionally imposed limitations on judicial power. Moreover, courts have failed to develop any consistent procedure for evaluating party requests. The reasons for this failure are not difficult to divine. Granting party requests for non-traditional judicial involvement would seem to be both convenient and efficient. To examine in every case whether the court has authority to grant the parties' request as well as whether the request is one that ought to be granted would be self-defeating. Such a process does not fulfill the promise of ADR to provide quicker and cheaper justice.

Yet efficiency is not everything. At least some courts acknowledge that obtaining efficient results at the expense of fairness is not a laudable achievement. Moreover, these courts recognize that, in our constitutional system, efficiency cannot be achieved at the expense of rights. Thus, in evaluating a variety of party requests, these courts have begun to ask very similar questions about statutory authority and institutional integrity issues. This Article proposes that courts adopt a unified approach to these issues in every case where parties request non-traditional use of judicial resources. Under this scenario, courts would, if possible, first identify a statute or rule that permits it to grant parties' requests. Once authority is established, the court would engage in a process designed to ensure that the integrity

of the court as an institution remains in tact. A review of the parties' request, designed to root out those requests that might damage society's perception of the courts as principled decision-makers, should adequately protect the status of the court as an institution.

While adoption of this test is unlikely to change the outcome of many court decisions, it would provide the kind of uniformity that would encourage party autonomy, which is useful in developing new and better ways of resolving disputes, while, at the same time, protecting the court as an institution. Moreover, the proposed test would allow courts the necessary means for evaluating parties' requests that a court review an arbitral decision using a standard the parties propose. While such requests have been rubber-stamped by the courts in past cases, the proposed test would ensure the protection of the court's institutional integrity through application of an arbitrary and capricious review. Already utilized routinely in administrative law to review agency decisions to ensure adequate factual support, an arbitrary and capricious review would allow a court to reject those party request that might not initially appear to threaten the court's integrity but actually do—such as requests for intensive review of an underlying decision where no record of the decision was kept.

This two-step review process acknowledges that courts are not puppets that litigants may manipulate as they wish. Courts do, and should continue to do, what is possible, given their limited authority, to grant party requests. After all, freedom of contract is an essential precept in our judicial system. Yet courts must refrain from granting requests that they do not have authority to grant. Moreover, courts must preserve the integrity of the court as an institution by rejecting those requests that would diminish the court's stature in the public's eyes.

For arbitration, this means that parties' requests for expanded review of arbitral awards should be approved so long as they do not require arbitrary and capricious decision-making by the court. While application of this test allows the "errors of law" standard to pass muster,[267] any request that the court review the arbitral award by a flip of a coin or by studying the entrails of a dead fowl, as Judge Kozinski so eloquently suggested, must be rejected.[268]

267. The "errors of law" standard is only acceptable if the parties have also agreed that the arbitrator would write an opinion explaining his factual findings and legal conclusions.

268. *See* Lapine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring).

***